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THE

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT.—MR JUSTICE CHANDRASEKHARA AIYAR AND MR. JUSTICE RAJAMANNAR

The Official Receiver of Vizagapatam (Mandavilli Mohana Rao) *Appellant**

v

Billapati Peda Suryanarayana and others . *Respondents.*

Provincial Insolvency Act (V of 1920), section 20—Interim receiver appointed under—Powers—Insolvency Court if can accord sanction to such receiver to institute suit against third parties to recover possession of property of insolvents in their hands

According to the provisions of section 20 of the Provincial Insolvency Act an *interim* receiver has such of the powers conferrable on a receiver appointed under the Civil Procedure Code, as the Court may direct There is nothing in the Provincial Insolvency Act which prevents the Insolvency Court from according sanction to an *interim* receiver to institute suits even against third parties for the vindication of the rights of the debtors in respect of whom an insolvency petition is pending. Hence, a suit by an *interim* receiver to recover possession of the property of the insolvents which has passed into the hands of third parties is maintainable

Appeal against the decrees of the Court of the Subordinate Judge, Vizagapatam, dated 11th September, 1943, in O. S No. 65 of 1941, etc

B V. Ramanarasu for *V. Govindarajachari* and *V. V Raghavan* for Appellant.

B. Jagannadhadas, C. V. Dikshitalu, Kasthuri Seshagiri Rao, D. V Reddi Pantulu and *N. K Vinayakam* for Respondents.

The judgment of the Court was delivered by

Rajamannar, J.—These four appeals are from four decrees and a common judgment of the Subordinate Judge of Vizagapatam dismissing four suits, O S. Nos. 65 of 1941, 3 of 1942, 46 of 1943 and 47 of 1943 instituted by the Official Receiver, Vizagapatam, as the *interim* receiver appointed in I P. No 5 of 1937 in the Court of the Subordinate Judge of Chicacole, for declarations that certain sales of bags of paddy to the contesting defendant in each case are invalid and not binding on the plaintiff and for the recovery of the bags of paddy alleged to have been sold, or, in the alternative, for payment of the price of such bags Several pleas were raised in defence by the contesting defendants, but the suits did not proceed to trial on the merits. The Subordinate Judge took up for hearing a preliminary issue to the effect "whether the plaintiff as *interim* receiver can sue third parties who dispute his right" and held against the plaintiff on the issue, and as a result dismissed all the suits without going into the merits. The plaintiff is the appellant in each of the appeals.

Two brothers, Kotha Muthyan Gari Sanyasi Chetti and Kotha Sanyasiraju were sought to be adjudicated insolvents by their creditors in I P No. 5 of 1937 already mentioned. Before final orders could be passed on the petition, the Subordinate Judge passed an order under section 20 of the Provincial Insolvency Act

* Appeals Nos 55, 56, 254 and 255 of 1944. 29th October, 1945.

appointing the then Official Receiver, one Mr. Jagannadha Rao, as *interim* receiver for the property of the debtors Mr. Jagannadha Rao was subsequently removed from office and the present plaintiff was appointed as Official Receiver and he also functioned as the *interim* receiver in I.P. No. 5 of 1937. On 10th November, 1941, the Subordinate Judge, Chicacole, accorded sanction to the *interim* receiver to file suits against such people as he may be advised to recover certain paddy bags or their value, to engage a vakil on his behalf and to incur the necessary expenditure. In accordance with this order the present suits were filed on various dates in 1941 and 1942.

The ground on which the Subordinate Judge has dismissed all the suits was that an *interim* receiver appointed under section 20 of the Provincial Insolvency Act cannot maintain a suit to recover possession of property of the insolvents which has passed into the hands of third parties. He has referred to section 56 of the Act, which obviously has no application to a case where suits are instituted in the interests of the body of creditors by a receiver. Section 56 provides for a summary remedy in insolvency for the recovery of the assets of the insolvent. Section 20 of the Act clearly says that an *interim* receiver shall have such of the powers conferrable on a receiver appointed under the Civil Procedure Code, 1908, as the Court may direct. It cannot be denied that a receiver appointed pending a suit can institute a suit in respect of the property which is the subject-matter of litigation or in respect of the rights of any of the parties thereto under orders of Court. This is exactly what ha happened here. The Subordinate Judge has permitted the *interim* receiver to take proceedings to recover either the goods or their value to which according to the allegation in the plaint the insolvents and their creditors would be entitled It is not at this stage that the Court should embark on a consideration of the merits of the several defences raised by the defendants. It would suffice for the present to say that there is nothing in the Act which prevents the Insolvency Court from according sanction to an *interim* receiver to institute suits even against third parties for the vindication of the rights of the debtors in respect of whom an insolvency petition is pending

The decision of the Subordinate Judge is obviously erroneous and is set aside. The suits will be restored to the file of the Subordinate Judge and disposed of according to law. The contesting respondents will pay the costs of these appeals, Advocate's fee being allowed only in Appeal Nos. 55 and 265 of 1944. Costs in the lower Court will abide the result. Court-fee paid for the appeals will be refunded to the appellant.

V.S. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE YAHYA ALI.

W. V. Arunachalam Chettiar . *Petitioner**

v.

K. G. Krishnaswami Iyer and others .. *Respondents.*

Provincial Insolvency Act (V of 1920), *section* 6 (g)—*Act of insolvency—Notice to creditor of intention to suspend payment—of debts Presentation by debtor of application to Debt Conciliation Board—If amounts to such notice—Statements during such proceedings—When amounts to such notice—Madras Debt Conciliation Act (XI of* 1936), *sections* 4, 8 *and* 25

The presentation *simpliciter* of an application for settlement of claims under the Madras Debt Conciliation Act does not amount to an intimation by the debtor that he had suspended or was about to suspend payment of all his debts An application for settlement does not necessarily involve that a settlement will be arrived at under which no creditor would receive the entire debt due to him The mere declaration in the petition that the debtor was unable to pay his debts is not sufficient to amount to a notice of suspension of payment of debts The real test is, what effect would the notice produce on the mind of the creditor receiving it as to the intention of a debtor with regard to his creditors

The provision in section 25 of the Madras Debt Conciliation Act for stay of all proceedings before Civil Courts in respect of debts for the settlement of which application had been made cannot amount to an automatic suspension of payment of debts by the debtor.

* C. R. P. No. 614 of 1944. 7th September, 1945.

Section 8 of the Madras Debt Conciliation Act does not contemplate the sending of a copy of the application along with the notice of it to the creditors and it cannot be said that if the office of the Debt Conciliation Board sent a copy of the application along with the notice, that act should be attributed to the debtor.

Petition under section 75 (1) of Act V of 1920, to revise the order of the District Court, Madura, dated 1st November, 1943, in C. M. A. No. 16 of 1943 (I. P. No. 12 of 1941, Sub-Court, Madura).

P. S. Ramaswami Aiyangar for Petitioner.

T. S. Vaidyanatha Aiyar for Respondent.

B. Venkataramiah, Court-Guardian.

The Court delivered the following

JUDGMENT.—This petition arises out of the proceedings relating to the insolvency of K. G. Krishnaswami Iyer. Two of his creditors filed I. P No. 12 of 1941 on 25th November, 1941, to adjudge him an insolvent. Subsequently, another creditor was impleaded as a supplemental petitioner because the two creditors who had filed the petition assigned their debts to a third person who made an attempt to join the insolvency proceedings as a petitioning creditor but did not pursue that course The supplemental petitioner died subsequently and respondents 7 to 9 are his legal representatives. One of the creditors Arunachalam Chettiar was impleaded as a respondent and both he and the insolvent opposed the application. The Subordinate Judge of Madura found that there was no act of insolvency within three months before the date of the application and consequently dismissed the same. On appeal, the District Judge held that Krishnaswami Iyer did commit an act of insolvency and reversing the order of the Subordinate Judge adjudged him insolvent and made further consequential directions. This appeal by the creditor Arunachalam Chettiar above referred to is against the order of the learned District Judge adjudging K. G. Krishnaswami Iyer an insolvent.

In the petition three acts of insolvency were alleged but only one of them was pressed. That consisted in an intimation which was said to have been conveyed to the petitioning creditors in September 1941, that the insolvent had made an application to the Debt Conciliation Board whereby he must be deemed to have intimated, to the creditors that he was suspending payment of all his debts. The debtor first opposed the application but subsequently filed a memorandum consenting to be adjudged an insolvent. Arunachalam Chettiar however continued to oppose the application.

On 21st July, 1941, Krishnaswami Iyer filed an application before the Debt Conciliation Board for the settlement of his debts. That application was filed under section 4 of the Madras Debt Conciliation Act. As prescribed in section 8 of the said Act, a date was fixed for the hearing of the application and notice thereof was sent both to the debtor and to the creditors. One such notice has been marked as Ex. P-5 It would appear that along with the notice a copy of the application presented before the Board was also sent. One such copy is Ex. P-4. In Ex. P-4 after setting out the debts, the debtor declared that he was unable to pay the debts stated in the petition. The application before the Debt Conciliation Board was dismissed on 17th November, 1941 and none of the advocates appearing in this case is in a position to state the reason why that application was rejected. I. P. No 12 of 1941 itself was, as stated already, filed on 25th November, 1941, ten days after the dismissal of the debtor's application to the Debt Conciliation Board.

Before examining the question whether the presentation of an application to a Debt Conciliation Board under section 4 of the Act by itself amounts to a notice given by the debtor to his creditors that he has suspended or that he is about to suspend payment of his debts within the meaning of clause (*g*) of section 6 of the Provincial Insolvency Act and the further question whether the statement made in the petition to the Board by the debtor that he was unable to pay the debts amounted to such a notice and whether the notice of that application sent by the Board to the creditors under section 8 of the Act again amounted to such a notice, it will be convenient to deal with another small matter which has been adverted

to in the judgment of the learned District Judge. The learned District Judge refers to a " despatch of notices by the debtor himself to his creditors of the presentation of such an application," meaning probably that there was besides the notice that was actually issued by the Board under section 8, some further intimation that was given by the debtor himself to the creditors of the fact of such an application having been presented to the Board. Possibly the learned Judge had in mind paragraph 13 of the petition in I P. No. 12 of 1941. In that paragraph it was alleged that the first petitioner's managing partner and the second petitioner's kariasthan met the debtor about two months prior to the filing of the application and that the debtor then apprised them of his inability to pay his debts and also that he had suspended payment of all his debts. If this case of a further oral intimation of the fact of such a petition having been presented to the Board was earnestly pressed, I have no doubt that the learned Subordinate Judge would have considered the same and given a finding thereon. I find no reference whatever in the judgment of the first Court to any such case of an oral intimation besides the statutory notice sent by the Board under section 8 of the Act. I must therefore hold that the allegation contained in paragraph 13 of the petition was abandoned at the time of the hearing of the application in the first Court The learned District Judge was referring to the despatch of notices by the debtor himself and not to any oral intimation of any kind made at a conference between the debtor and some of the creditors. That allegtaion will therefore have to be ignored.

I have set out already the questions that fall to be considered in this matter. The proposition that the presentation *simpliciter* of an application for settlement of claims under the Debt Conciliation Act amounts to an intimation by the debtor that he had suspended or was about to suspend payment of all his debts seems to be wholly untenable. An application for settlement does not necessarily involve that a settlement will be arrived at under which no creditor would receive the entire debt due to him. That appears to be the assumption upon which the learned District Judge has acted but in my opinion that assumption is wholly unwarranted by the Debt Conciliation Act. There is no doubt a declaration in the petition that the debtor was unable to pay his debts. But that *per se* is not sufficient to amount to a notice of suspension of payment of debts. The real test in such a matter is, as rightly set out by the learned District Judge, following the decision in *Ganga Veerabrahmam* v. *Ganga Jagannadhacharyulu*[1], what effect would the notice produce on the mind of the creditor receiving it as to the intention of a debtor with regard to his creditors? Would it convey to the creditor that the debtor was about to stop payment or had stopped payment. For that purpose it is necessary to examine the petition itself with a view to see whether a person perusing the same would reasonably form the impression that the debtor intended thereby to suspend payment of debts. I have examined the petition and I find that as a matter of fact the liabilities were shown to amount to a sum of Rs. 88, 712 while assets were represented to be worth Rs 90,560. In these circumstances, the creditors could not possibly have thought that the debtor's financial condition was so shattered that he intended, or would be constrained, to suspend or stop payment of his debts It may be that on account of certain difficulties or obstacles he was not in a position at the moment to meet the calls or to pay up the most pressing debtors but that does not amount to a suspension of payment of debts.

It is next urged that under section 25 of the Debt Conciliation Act all suits or proceedings pending before Civil Courts in respect of debts for the settlement of which application had been made could not be proceeded with until the application had been dismissed by the Board and that provision amounted to an automatic suspension of payment of debts by the debtor. I am unable to see any force in this argument The result of the statutory provision may be for the time being to stay certain pending suits or other proceedings but mere stay of suits and proceedings pending in Civil Courts does not prevent or preclude the creditors from otherwise collecting the debts and

1 (1935) 69 M L J 184

does not by itself amount to actual suspension of payment of debts by the debtor. What section 6 (*g*) of the Provincial Insolvency Act requires is that the suspension should be the act of the debtor himself and not an incident arising from a saving clause in another statute and the notice intimating to the creditors the fact of such suspension should also be the act of the debtor himself or his agent. It cannot be and it has not been urged that the Debt Conciliation Board was the agent of the debtor. In the present case, no such notice was issued by the debtor himself. Nor did he personally intimate to all his creditors that he had suspended or was about to suspend payment of his debts It is significant that I P No 12 of 1941 was filed after the petition before the Debt Conciliation Board had been dismissed The learned District Judge is therefore not justified in holding that the effect that the debtor intended to produce on the mind of every creditor and the effect that was actually produced on the mind of every creditor was that the debtor was intending to suspend payment of his debts. Further, section 8 of the Debt Conciliation Act does not contemplate the sending of a copy of the application along with the notice and it cannot be said that if the office of the Debt Conciliation Board sent a copy thereof along with the notice, that act should be attributed to the debtor

Taking all these factors into consideration I am of opinion that the view taken by the learned District Judge was not supported by the respective provisions of the Madras Debt Conciliation Act and the Provincial Insolvency Act This revision petition will therefore be allowed with costs against the contesting respondents reversing the order of the learned District Judge in C M A No. 16 of 1943 In the result the order adjudging K G Krishnaswami Iyer an insolvent is vacated.

K S *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE WADSWORTH AND MR JUSTICE PATANJALI SASTRI.

Maganti Venkataswami Naidu . *Appellant**

v.

Annapareddi Nagireddi *alias* Mutyalu Reddi *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938)—*Civil Procedure Code (V of* 1908), *section* 144—*Power to modify decree in the light of Act IV of* 1938 *after appeal had been disposed of—Restitution —Principle underlying*

A mortgagee filed a suit on a mortgage and the 1st appellate Court decreed the suit The amount due was reduced by the High Court in second appeal Pending the second appeal the decree-holder took out execution and certain properties were brought to sale and sold to the decree-holder and taken delivery of by him On the date of the hearing of the second appeal an application was filed by the person whose properties were brought to sale in execution for scaling down the decree in accordance with the provisions of Act IV of 1938 That application when it came on for hearing was remanded to the trial Court for disposal and the trial Court scaled down the debt On an application for restitution being filed by the person whose properties were sold in execution of the mortgage decree,

Held, (*i*) That the decree in second appeal having become final any finding by the trial Court regarding the relief which might have been obtained had the proper procedure been taken will not affect the decree

Srirama Reddi v *Srirama Reddi*, (1941) 2 M L J 855 I L R. (1942) Mad 346 (F B), followed

(*ii*) That as the true criterion for restitution is to consider what would be the position had the appellate Court's decree been passed by the Court of first instance and as the sales which had been held were sales which would have been held even if the Court of first instance had decreed the amount eventually found to be due in appeal, there was no legal or equitable reason for setting aside the sales or ordering restitution

Sundararama Reddi v *Raghava Reddi*, (1921) 42 M L J 315, referred to

Appeals against the orders of the Court of the Subordinate Judge of Tenali dated 31st December, 1943, and made in A S Nos 47 and 54 of 1943, respectively preferred against the order of the Court of the District Munsiff of Tenali dated 23rd January, 1943, and made in E A No 466 of 1940 in O. S. No 243 of 1928

M. S. Ramachandra Rao for Appellant

K Kotayya for Respondent.

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*A A. A O Nos 79 to 81 of 1944 6th March, 1945

The Judgment of the Court was delivered by

Wadsworth, J—These three appeals are preferred by the decree-holder in a mortgage suit against the orders resulting from proceedings after the decree. The suit was one of 1928. It was dismissed by the trial Court. The first appellate Court passed a decree in January 1934, for payment of Rs. 3,031-7-0 as on 22nd April, 1934, the date fixed for redemption. A second appeal was filed to this Court. While that second appeal was pending, the decree-holder took out execution. On 1st February, 1936, a portion of the hypotheca which belonged to the 8th defendant who was not one of the mortgagors was sold for Rs. 1,785 to the decree-holder, who got delivery. On 4th January, 1937, there was a further sale of items belonging to the mortgagors, defendants 1 to 3, for a sum of Rs. 855 in favour of the decree-holder who also got delivery. The second appeal came up for hearing on 1st November, 1938 By this time Madras Act IV of 1938 had come into force, but the precise effect of its terms was subject to a good deal of legal speculation and there was much uncertainty as to the procedure to be followed in obtaining relief with reference to matters pending in appeal. On the day on which the second appeal came up for hearing, the 8th defendant filed C M. P No. 4,638 of 1938 claiming relief under the Act It seems likely that the decree-holder asked for time to file a counter-affidavit The hearing of the second appeal was concluded on the 2nd of November, and judgment was pronounced that day reducing the amount of interest so that the total decree was for Rs 2,335-10-0 as on the date fixed for redemption by the first appellate Court To this decree would have to be added interest at 12 per cent for approximately 3½ years There is no reference in the judgment or the decree to the petition filed under Madras Act IV of 1938. Counter-affidavits were in due course filed in this petition, which came up for hearing on 27th July 1930, and in a brief order it was remanded to the District Munsiff of Tenali for disposal in accordance with the provisions of Act IV of 1938 In the District Munsiff's Court there was an order scaling down the debt to Rs 637 which purported to be passed on consent Against that order there was a review petition which was dismissed and against the dismissal there was a revision petition which was allowed with the result that the review was allowed and the original petition was restored to file Meanwhile, the 8th defendant had been prosecuting an application for restitution as a result of the scaling down of the decree following the second appellate decision Originally both the sales were set aside and there was an appeal to the District Court in which the second sale in respect the properties of the mortgagors was held to be unassailable, while the sale of the 8th defendant's property was set aside A second appeal was filed in respect of this order which was reversed and remanded to the trial Court so that the question of restitution could be heard along with the question of the scaling down of the decree.

The result of all these proceedings is that the lower appellate Court has now restored the original order scaling down the decree to Rs 637, has directed the setting aside of the sale of the 8th defendant's properties on payment of the amount of the decree as scaled down and has also directed the ascertainment of mesne profits on the lands for the period during which they were in the possession of the decree-holder. Against these orders, the present appeals are preferred. C M S. A. No. 79 of 1944 is against the order for restitution C M S. A No 80 of 1944 is against the order for mesne profits and C. M S A. No. 81 of 1944 is against the order scaling down the debt.

It will be convenient to deal with the last appeal first, in order that we may ascertain what is the amount which the decree-holder was entitled to recover as a result of these proceedings. The Courts below appear to have taken the view that because this Court remanded the petition for disposal by the trial Court there was no longer any question of the power of the trial Court to modify the decree in the light of the provisions of Act IV of 1938. We cannot agree with this view. Though there was, for some time, considerable doubt as to the powers and procedure of an appellate Court dealing with questions under Madras Act IV of 1938 raised for the

first time at or shortly after the passing of judgment in appeal, those doubts have been set at rest by the decision of the Full Bench in *Srirama Reddi* v. *Srirama Reddi*[1]. The Full Bench held that when judgment has been pronounced, the Court has no power to make any order affecting the judgment which has been delivered, unless passed on an application for review, and in the case under consideration of the Full Bench it was held to be illegal to have added to the judgment a provision for the determination of the relief which was due under Madras Act IV of 1938 and its subsequent incorporation in the decree. The Full Bench went on to consider the practice of dealing with an application for relief under the Act made before the delivery of judgment by directing an enquiry and ordering in the judgment that the amount found due should be subject to the finding as a result of that enquiry This practice was held to be inexpedient, but was not declared to be illegal. It is, however, quite clear from the judgment of the Full Bench that when once the appellate Court, after the passing of Act IV of 1938, has delivered judgment in a case in which relief might have been granted, but has not been granted, in the judgment, it has no power at a subsequent stage to add anything by way of a rider to its judgment which will confer a relief which should have been sought and obtained before the judgment was pronounced.

Having regard to this decision, it seems to us impossible to contend that merely because an application for relief was filed at the time of the hearing of the appeal, the right of the party concerned to relief under the appellate judgment must be deemed to be in suspense and capable of being subject to a further adjudication after the appellate Court has disposed of the appeal. Once it is granted that the Court which heard the second appeal had no power, after it had delivered judgment, to modify that judgment by conferring upon one of the parties a relief under the Act which was not obtained at the proper time, it follows clearly that the order of this Court remanding this petition to the trial Court for disposal, would not give to the trial Court any power which it did not already possess to modify this Court's decree. The decree in second appeal being final any finding by the trial Court regarding the relief which might have been obtained had the proper procedure been taken, will not affect that decree It follows therefore that C. M. S. A No 81 of 1944 must be allowed with costs throughout and the application for relief under Act IV of 1938 will be dismissed, with the result that the decree of this Court in second appeal awarding a sum of Rs 2,335-10-0 with further interest will govern the rights of the parties

There remains the question of restitution. In view of our decision on the scaling down question, the modification of the decree as a result of the second appeal is merely the reduction of the amount decreed by the lower Court from Rs. 3,031-7-0 to Rs 2,335-10-0 with further interest at 12 per cent. The two sales together realised a sum of Rs. 2,640. The first sale was that in respect of which restitution is sought. It realised a sum of Rs 1,785 It is contended by Mr Kotayya, on the authority of the decision in *Syed Nathadu Sahib* v. *Nallu Mudaly*[2], that whenever a decree is varied in appeal, a sale held under the trial Court's decree has necessarily to be set aside if the purchaser is the decree-holder. The decision on which reliance is placed is a decision passed under section 583 of the old Code of Civil Procedure, the terms of which are entirely different from those of section 144 of the present Code of Civil Procedure. In *Sundararama Reddi* v. *Raghava Reddi*[3], a Bench of this Court had to consider a question similar to that which is now raised and it held that whatever be the merits of the decision in *Syed Nathadu Sahib* v. *Nallu Mudaly*[2], with respect to the law as it then stood, that decision is not any authority for the interpretation of the law as it now exists. Under section 144 of the present Code the position is plain. It is only where and in so far as a decree is varied or reversed tha restitution can be made, and the restitution to be made is that which will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has

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1. (1941) 2 M.L J 855 I.L.R (1942) Mad 346 (F.B).
2. (1903) I L.R 27 Mad. 98
3. (1921) 42 M L.J. 315

been varied or reversed. The true criterion seems to be to consider what would be the position had the appellate Court's decree been passed by the Court of first instance If the sale which has been held is one which would have been held even if the Court of First Instance had decreed the amount eventually found due in appeal, there is no legal or equitable reason for setting aside that sale or ordering restitution On the facts of the present case, it is clear that at the time when the sale of the 8th defendant's property was held the amount due to the decree-holder on the basis of the eventual decree passed in second appeal would have been very much more than the amount for which the property was sold It cannot therefore be said that the sale of the 8th defendant's property was the result of the error in the original Court's decree Even if we take the two sales together, it would appear that the total amount for which both the properties were sold approximates very closely to the amount which had been ultimately found due In such circumstances, there is no case for restitution at all

In the result, we allow C M S A Nos 79 and 80 of 1944 with costs throughout —one advocate's fee—and the restitution application will be dismissed.

V.P S

Appeals allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT .—MR JUSTICE CHANDRASEKHARA AIYAR

Komancheri tarwad Karnavan Chathu Nayar ... *Appellant**

v

Vengalil K. Janaki Amma ... *Respondent.*

Malabar Compensation for Tenants Improvements Act (I of 1900)—*Decree for redemption of kanom—Purchase by another in sale in execution of decree against the holder of redemption decree —Execution by such purchaser —Objection to validity of sale of decree—Sustainability—Madras Civil Rules of Practice, rule* 178—*Scope—Deposit of konom amount and value of improvements—Not a condition precedent to execution—Future rent till surrender of possession—Right to set-off against value of improvements—Permissibility—Civil Procedure Code (V of* 1908), *Order* 20, *rule* 12—*If abrogated by Malabar Compensation for Tenants Improvements Act.*

A decree for redemption of a kanom was passed on 29th June, 1923 in favour of the melcharthdar and determined the amounts due to the several defendants as value of improvements The decree directed that on the plaintiff paying into Court the kanom amount and the value of improvements less certain damages payable by the second defendant and future rent until surrender, the defendants should give up possession of the property to the plaintiff This decree was attached and purchased in the sale in execution by a creditor of the decree-holder and the purchaser sought to execute the decree.

Held (1) Though rule 178 of the Civil Rules of Practice (Madras) says that no decree shall be ordered to be sold in execution of another decree, when such a sale takes place, without any objection being raised by the judgment-debtor, the sale cannot be held to be void or inoperative

Subbaraya Rowthu v *Kuppusawmi Aiyangar*, (1909) I L R 34 Mad 442 relied on

(2) The deposit of the kanom amount and the value of the improvements is not a condition precedent to the execution of the redemption decree It is sufficient if the amount is paid before the properties are surrendered

(3) The tenant is entitled to set-off against the value of improvements due to him the future rents till the actual date of surrender of possession in a case coming under the Malabar Compensation for Tenants Improvements Act The jurisdiction to award future rent can be exercised not only at the time of passing the decree but also later in the course of execution It cannot be said in such a case that the provisions of Order 20, rule 12 of the Code of Civil Procedure apply to bar recovery of future rent for any period over three years

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Calicut dated 10th July, 1944, and made in A. S. No. 87 of 1943, preferred against the order of the Court of the District Munsiff, Calicut, dated 1st February, 1943, and made in E P. No 1575 of 1937 in O S. No. 401 of 1921

P. Govinda Menon for Appellant

K. Kuttikrishna Menon for Respondent.

The Court delivered the following

JUDGMENT .—This is an appeal by the first respondent against the order of the Subordinate Judge of South Malabar at Calicut in an execution petition. The

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*A. A O No 493 of 1944 2nd November, 1945

decree was for redemption of a kanom and was passed on 29th June, 1923, in favour of the me charthdar It determined also the amounts due to the several defendants as value of improvements, and directed that on the plaintiff paying into Court the kanom amount and the value of the improvements, less certain damages payable by the second defendant and future rent until surrender, the defendants should give up possession of the property to the plaintiff This decree was attached by a creditor of the decree-holder who had obtained a decree against him in O S No 847 of 1932 The decree was sold in auction and was purchased by that decree-holder and the application for execution is by her

Execution was resisted by the first respondent (second defendant) on several grounds Chief among them are (*a*) that the sale of a decree in Court auction is invalid and therefore the petitioner derives no rights under her purchase, (*b*) the deposit of the kanom amount and the value of improvements is a condition precedent to execution and as it was made more than twelve years after the date of the decree, execution is barred, and (*c*) the direction that the amount payable by the plaintiff should be set off against future rent until surrender means only rent for three years and not for the full period from the date of the decree up to the date of execution as claimed by the petitioner The learned Subordinate Judge, as did the learned District Munsiff, overruled the objections and allowed execution to proceed The second defendant has preferred this second appeal raising the same objections.

There is a memorandum of objections by the respondent-petitioner in the Court below, that she should be given credit for Government revenue paid by her which the defendants were bound to pay, and that as regards the value of improvements which the decree directed should be paid to the sub-tenants and which were actually paid by the original decree-holder, the learned Subordinate Judge was wrong in holding that such payments are not binding and that the value should again be deposited in Court as condition precedent to the delivery of possession

Rule 178 of the Civil Rules of Practice no doubt says that no decree shall be ordered to be sold in execution of another decree; but when such a sale takes place without any objection being raised by the judgment-debtor, the sale cannot be held to be void or inoperative On the other hand, there is the authority of *Subbaraya Rowthu* v *Kuppuswami Aiyangar*[1] for holding that the sale is good

There is no substance in the contention that the deposit of the kanom amount and the value of improvements was a condition precedent to the execution of the decree The payment is no doubt a conditon precedent to the recovery of possession but not to the filing of an execution petition for such recovery The present execution petition is within time and the obligation imposed by the decree as regards payment is that it should be made before the properties are surrendered

The third point about future rent is a bit more complicated Under Order 20, rule 12, Ci il Procedure Code, where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court in directing possession can direct an enquiry as to rent or mesne profits from the institution of the suit until the delivery of possession to the decree-holder or the relinquishment of possession by the judgment-debtor or the expiration of three years from the date of the decree, whichever first occurs *Krishnan* v *Kunhi Moidin Kutti*,[2] and *Godavarti Raja* v *Uttaradi Matam Sri Ramachandraswami Varu*[3] are authorities for the proposition that where a decree directs payment of future rent till surrender, it must be taken to mean, in conformity with the requir ment of the Civil Procedure Code, that it is a direction for payment of rent for three years or until surrender, whichever event first occurs These decisions would govern us, but for certain provisions of the Malabar Compensation for Tenants Improvements Act (I of 1900), which it is contended, alter the position in favour of the decree-holder and enable him in a case governed by the Act to set off against the improvements future rents until the actual date of surrender of possession. Both the lower Courts took this view.

1 (1908) I L R 34 Mad 442
2. (1899) 9 M L J 334
3 (1943) 1 M L J 253

How far it is right has now to be examined. It may be stated at once that the view of the learned Subordinate Judge that because the decree provides for the payment of future rent until surrender it must be taken that the decree means what it says and the period for which rent is to be allowed is not open to question must he held to be wrong in view of the decisions cited above The answer to the question raised will depend upon the effect to be given to the provisions of the Malabar Compensation for Tenants Improvements Act and how far they could be said to abrogate by necessary implication the requirements of Order 20, rule 12 of the Civil Procedure Code

The Act referred to above provides in section 5 for the payment to the tenant of compensation for improvements on ejectment The second part of the section is relevant and important for our present purposes and it is in these terms

"and every tenant to whom compensation is so due shall, notwithstanding determination of the tenancy or the payment or tender of the mortgage money (if any), be entitled to remain in possession until ejectment in execution of a decree or order of Court"

Sub-clause (2) says·

" A tenant so continuing in possession shall during such continuance hold as a tenant subject to the terms of his lease or of the mortgage, as the case may be "

Under section 6 the Court shall pass a decree declaring the amount found due for compensation and ordering that on payment by the plaintiff into Court of the amount so found due and also the mortgage money, the defendant shall put the plaintiff into possession of the land with the improvements thereon Sub-clauses (2) and (3) of the section run in these terms

"(2) If in such suit the Court finds any sum of money due by the defendant to the plaintiff for rent or otherwise in respect of the tenancy, the Court shall set off such sum against the sum found due under sub-section (1), and shall pass a decree declaring as the amount payable to him on ejectment the amount (if any), remaining due to the defendant after such set-off

(3) The amount of compensation for improvements made subsequent to the date up to which compensation for improvements has been adjusted in the decree, and the re-valuation of an improvement for which compensation has been so adjudged, when and in so far as such re-valuation may be necessary, with reference to the condition of such improvement at the time of ejectment as well as ' any sum of money accruing due to the plaintiff subsequent to the said date for rent or otherwise in respect of the tenancy, shall be determined by order of the Court executing the decree and the decree shall be varied in accordance with such order' "

It is thus clear from the aforesaid provisions that the decree in ejectment against the tenant does not determine the tenancy and convert him into a trespasser He has a statutory right to continue in possession after decree until he is paid the value of his improvements In other words, there is a tenancy created by the statute for the period during which the decree is in execution , and during this period the tenant holds under the terms of his lease The continuance of the tenancy notwithstanding ejectment, the provision for payment for compensation for improvements and for set-off of the rent against compensation and, especially the power conferred upon the Court by clause (3) to value improvements subsequent to the date of the decree and re-value the original improvements as on the date of ejectment and to vary the decree accordingly, show beyond question that what is contemplated under the Act is a final adjustment of all rights and obligations between the two parties Sub-section (3) of section 6 speaks of any sum of money accruing due to the plaintiff subsequent to the date up to which compensation for improvements has been adjudged in the decree and it is provided that this amount shall also be determined , and obviously this is for the purpose of set-off to be allowed under sub-section (2) It follows that in a case coming under the Act, the Court has jurisdiction to award future rent till the date of actual surrender and this jurisdiction must be exercised not only at the time of the decree but also later in the course of execution In view of the provisions referred to above of the Act, a fresh suit for rent for subsequent period would seem to be barred as pointed out in *Gopalan* v *Sankaran Nair*[1].

1 (1945) 1 M L J 326 I L.R (1945) Mad. 870

It was urged that this view would enable the landlord to wait indefinitely without paying the value of improvements and claiming rent for more than the prescribed period of three years But this argument ignores the very policy underlying the Malabar Compensation for Tenants Improvements Act, namely, the landlord should not by way of ejectment proceedings determine the tenancy at his sweet will and pleasure without being under an obligation to pay for improvements and that till payment the tenant has a right to hold the property as tenant on condition of paying the rent reserved by the deed So if the landlord keeps quiet without paying for the improvements the tenant loses nothing He continues to hold as before and when he is ejected he must get what is due to him for improvements setting off against it what is due for rent by him

The appeal fails and is dismissed with costs There is a memorandum of objections by the respondent The revenue of the property is to be paid by the tenants If they did not pay, the landlord will of course have to pay it and recover it from them The District Munsiff allowed to the petitioner the revenue that he paid subsequent to the filing of the suit and previous to the filing of the execution petition, the payments being evidenced by the receipts Exs. P-2 (i) and P-2 (l). The Subordinate Judge disallowed this on the ground that there was no direction in the decree awarding future revenue It is obviously wrong The direction of the District Munsiff will be restored

The next point relates to the value of improvements paid to the sub-tenants and dealt with by the District Munsiff in paragraph 18 of his judgment discussing point No 5 It is not disputed that the payments were made in pursuance of the direction in the decree The persons who received the payments were entitled to receive them acknowledged their receipt and applied to the Court for recording satisfaction, which prayer was granted It is not for the appellant to contend that as the decree provides for payment into Court, payments made outside the Court to persons entitled to receive them should not be recognised The surrender of their rights in the land by the sub-tenants in favour of the landlord may not bind the appellant-tenant, but that is a different question The improvements were made by the sub-tenants They are the persons entitled to their value The decree-holder paid the amounts into their hands already and satisfaction was recorded There is no point in asking the landlord to deposit the said amounts into Court as condition for recovery of possession; the 1st respondent is not entitled to the sum and the sub-tenants cannot get them either As pointed out by the learned District Munsiff the appellant-tenant may have rights of his own to enforce against the sub-tenants and the landlord who now stands in their shoes This portion of the lower Court's order directing the respondent to deposit in Court the value of improvements payable to the defendants 44, 51, 57, 58, 63, 71, 83, 84, 90, 101 and 113 as a condition precedent to delivery of possession to the petitioner will stand set aside

The memorandum of objections is hence allowed but without any order as to costs as the respondent has got costs in the appeal

(No leave).

K S — *Appeal dismissed and memorandum of objections allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE YAHYA ALI

Galley & Co, represented by the Proprietor G. Ranganadham *Petitioner**

v

Dathi China Appalaswami Naidu . *Respondent.*

Civil Procedure Code (V of 1908), section 20 (c)—Scope —Cause of action arising wholly or in part—Test—Suit on contract—Place where cause of action arises

*C R P No 41 of 1945 19th October, 1945

Although explanation III to section 17 of the Code of Civil Procedure of 1882 corresponding to section 20 of the present Code of 1908 has been omitted as no longer necessary in view of the wide ambit of clause (c) of the present section 20 of the Code, it is nevertheless a correct statement of what is still the law Accordingly in suits arising out of contract the cause of action arises at any of the following places, viz, (1) the place where the contract was made, (2) the place where the contract was to be performed or performance thereof completed, (3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable

Where an agent in Madras to whom goods were sent from Rajahmundry for sale on commission undertook to pay the net sale value to the owner on the third day after the transaction closes, there is by necessary implication an agreement to make the payment of the money due to the owner of the goods at Rajahmundry In such circumstances part of the cause of action arose at Rajahmundry and a suit filed at Rajahmundry in respect of the contract is within jurisdiction

Authorities discussed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree of the District Court, East Godavari at Rajahmundry, dated 24th October, 1944, in C M A No 38 of 1943 preferred against the decree of the District Munsiff Court, Rajahmundry in O S. No. 159 of 1942.

K Subba Rao for Petitioner.

B V. Ramanarasu for Respondent.

The Court delivered the following

JUDGMENT —The defendant firm, Galley and Co, auctioneers at Madras, who are the petitioners, here were sued by the respondent who carries on business at Rajahmundry The suit was for the recovery of a sum of Rs 1,632-8-0 being damages claimed for alleged breach of the contract entered into between the plaintiff and the defendant firm that the latter would sell on behalf of the plaintiff a quantity of aluminium ingots and after deducting their commission pay the balance of the sale proceeds to the plaintiff The goods were alleged to have been sold contrary to instructions resulting in loss to the plaintiff The contract is contained in the correspondence that passed between the parties In Ex D-1, the plaintiff wrote to the defendant on 12th March, 1938, asking if the firm would agree to charge a commission of five per cent on two tons of aluminium ingots which were being sent for sale In reply the firm wrote on 13th March, 1938 (Ex P-1) as follows.

"Your letter of yesterday's date, received and noted that you have two tons aluminium ingots for auction sale for which we thank you

As desired by you we shall accept five per cent commission on the sale proceeds and pay you the net sale value on the 3rd day after transaction closes.

Awaiting your consignment of aluminium ingots as early as possible"

The consignment was accordingly sent to Madras from Rajahmundry and was acknowledged by the defendant by his letter Ex P-3 dated 25th March, 1938 Some attempts at sale appear to have been made but were withdrawn by the auctioneers for want of satisfactory bids Ultimately the goods were sold on 7th September, 1940, but no intimation of the fact of the sale having taken place was sent to the plaintiff On 9th October, 1941, the plaintiff wrote to the defendant Ex D-3 directing that the lot should be sold only if it fetched a value of Rs 40 per cwt. and if that price was not fetched, the goods should be returned to Rajahmundry In reply to this communication the defendant firm wrote Ex P-4 dated 10th October, 1941 The letter is in these terms

"We are in receipt of your letter dated 9th instant and in reply we have to state that your aluminium ingots were sold as long ago as 7th September, 1940, for Rs 120, the whole lot as per instructions contained in your letter dated 4th April, 1939, but by an oversight, the sale proceeds were not remitted to you

We are taking the details of your account (i e,) rent accrued from the date of receipt, amount paid for clearing the stuff, withdrawal charges on several sales tried and we shall remit you the net sale proceeds next week"

On 14th October, 1941, the plaintiff caused a registered notice to be sent to the defendant through his lawyer and in reply thereto, the defendant wrote the letter Ex P-5 dated 21st October, 1941 The defendant sent with that letter a statement of account and a cheque for the balance of Rs. 68 shown at the foot of the account. The account itself is Ex. P-6.

The defendant raised several averments in his written statement one of which was that no part of the cause of action arose at Rajahmundry and that consequently the Rajahmundry Court had no jurisdiction to entertain the suit The learned District Munsiff tried the issue relating to jurisdiction as a preliminary issue and finding that the Court had no jurisdiction directed that the plaint be returned for presentation to the proper Court Plaintiff appealed to the District Judge who differed from the view taken by the first Court and held that the Rajahmundry Court had jurisdiction to try the suit This revision petition filed by the defendant arises out of that order of the District Judge

Clause (*c*) of section 20 of the Civil Procedure Code of 1908 provides that a suit shall be instituted in the Court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises In the Code of 1882, the corresponding provision was contained in Explanation III to the corresponding section (section 17) which ran as follows —

> "In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, *viz*, (1) the place where the contract was made, (2) the place where the contract was to be performed or performance thereof completed, (3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable"

Although this explanation has been omitted in the present Code as no longer necessary in view of the wide ambit of clause (*c*) of section 20, it is nevertheless a correct statement of what is still the law In the present case, the Rajahmundry Court will have jurisdiction if the plaintiff can show that, under the terms of the contract the performance of the contract has to be completed in Rajahmundry or that in performance of the contract any money to which the suit relates as expressly or impliedly payable at Rajahmundry Reference has been made to Ex P-1 which contains the acceptance of the plaintiff's offer by the defendant firm and in it is found the statement that the defendant would pay the plaintiff the net sale proceeds on the 3rd day after the transaction closes Likewise in Ex P-4 when the defendant was reminded of the contract, which the firm appears to have completely forgotten the defendant again reiterated that after examining the accounts, the net sale proceeds would be remitted to the plaintiff In both these letters, no express reference has been made to the place where payment would be made and hence the question is whether, having regard to the nature of the case and the attendant cirucmstances, it can be found that by necessary implication the defendant had agreed to make the payment to the plaintiff at Rajahmundry Apart from the technical aspect of the matter or the aspect that arises upon a scrutiny of the judicial decisions bearing upon the point, as a matter of plain reasoning, it could be premised that when a person says "I shall pay you the sale proceeds within a particular time," he means, unless he has qualified that statement by adding that he would pay at his own place, that he would pay and deliver at the place of the addressee or payee But apart from this simple and natural way of looking at the thing, a specific provision is found in section 49 of the Indian Contract Act that when a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place The duty having been cast by statute on the promisor (in the present case the defendant) to apply to the promisee to appoint a place for the performance of his obligation to pay the amount, he cannot, either as a matter of law or of justice, improve his position by neglecting to perform that duty

Apart from and independently of this statutory provision, the plaintiff's advocate has relied on the English Common Law rule enunciated by Bowen, L J, in the "*the Eidtor*," [1] that where there is no express contract to the contrary a debtor should seek out and pay the creditor and contends that consequently, it was the defendant's duty to pay him at his place of residence On the defendant's side

1. (1893) L.R. P.D 119 at 136.

it is argued that the English rule has no application and should not be extended to this country and that the trend of the decisions in the various Courts has been in that direction A large volume of case-law has been cited on both sides upon this question I shall deal with a few of these cases In *Motilal* v *Surajmal*[1], Tyabji, J , in a case of *del credere* agency applied the maxim that where no specific contract exists as to the place where the payment of the debt is to be made, it is the duty of the debtor to make the payment where the creditor is That decision was followed by the same Court in *Kedarmal* v *Surajmal*[2] Both these cases were followed with approval by this Court in *Naina Maracayar* v *Somasundaram Chettiar*[3] which was a case of a merchant at Negapatam who consigned goods to a merchant at Penang for sale on commission It was held that the Negapatam Court had jurisdiction to entertain the suit as a part of the cause of action arose there since the arrangement was that the Penang merchant should remit the proceeds by sending to Negapatam hundials drawn on some firm in the Madras Presidency In *Venkata Reddi* v *Nataraja Setti*[4] upon similar facts Ramesam, J , held that by implication money was intended to be paid to the plaintiff at his native place and consequently jurisdiction arose at plaintiff's place It is necessary however to note that as early as 1907 in *Raman Chettiar* v *Gopalachariar*[5], this Court had discountenanced the extension of the general rule to cases governed by the third explanation to section 17 of the Code of 1882 and distinguished the decision of Tyabji, J , in *Motilal* v *Surajmal*[1] and held that the Court is bound to seek the jurisdiction of the Court within the provisions of the Code

This was the position until about 1924. Further doubt was cast on the applicability of the English Common Law rule by the Allahabad High Court in *Tikaram* v *Daulat Ram*[6] A Division Bench of that Court while discussing the English rule expressed the view that while it might be generally applicable to the ordinary case of purchaser and vendor, it would not with equal force apply to the case of principal and agent or master and servant That was also a case of *del credere* agency. While referring to *Motilal* v *Surajmal*[1] the learned Judges pointed out that they were not entirely in accord with that decision The Allahabad decision was referred to by a Division Bench of the Bombay High Court in *Nandlal* v *Kisanlal*[7] as also the decision in *Motilal* v *Surajmal*[1] and the learned Judges preferred to follow the view taken by the Allahabad High Court in *Tikaram* v *Daulatram*[6] This was also a case of commission agency and in the course of the judgment, reference was made to the decision of the Privy Council in *Soniram Jeetmull* v *R D Tata and Co , Ltd* ,[8] to which I shall advert presently *Motilal* v *Surajmal*[1] was again not followed in *Mohamed* v *Jute and Gunny Brokers, Ltd* ,[9] a decision of a single Judge of the Bombay High Court, on the ground that the Allahabad High Court differed from Tyabji, J 's view and the Allahabad decision was followed by the Bombay High Court in *Nandlal* v *Kisanlal*[7] In the case of *Soniram Jeetmull* v *R D Tata and Co , Ltd* ,[8] the appellants before the Privy Council were sued in Rangoon by R D Tata and Co , who had a business branch at that place, for payment of sums of money due upon the failure of constituents to satisfy debts due to Messrs Tata Sons and Co , which sums the defendants had undertaken to make good to them In that suit Messrs Jeetmull, who carried on business at Calcutta, contended that they could not be sued for this money in Rangoon Clause 2 of the contract expressed Messrs Jeetmull's obligation to pay and stated that Messrs Jeetmull were to make good any undisputed claims that Messrs Tata and Co , might lose owing to the failure on suspension of payments of constituents. Upon this clause the question arose whether the contract relating to payment was performable by Messrs Jeetmull at Rangoon. On the plain construction of the clause, their Lordships said this ·

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1 (1904) I L R 30 Bom 167
2. (1908) I L R 33 Bom 364
3. (1920) 11 L W 593
4 (1924) 46 M L J 371.
5. (1908) I L.R 31 Mad 223
6. (1924) I L R 46 All 465
7 (1928) 30 Bom L R 1391
8. (1927) 53 M L J 25 L R 54 I A 265 : I L R 5 Rang 451 (P C)
9. (1930) 33 Bom.L R 1364

"It is quite true that the contract does not say where Messrs Jeetmull was to pay, but it does say, by an implication which is indisputable, that they are to pay Messrs Tata Sons Co, and it follows that they must pay where that firm is. Hence one would think that, upon the face of this contract, not indeed in express terms, but by the clearest implication, payment is to be made in Rangoon."

Thereafter reference was made to the English Common Law rule that the debtor must seek out the creditor and after saying that even without invoking the rule, it was a mere implication of the meaning of the parties that the debtor in that case had to find and pay the creditor, their Lordships referred to section 49 of the Indian Contract Act and commented that the debtor could not, by failing to perform the statutory duty of appointing a place for payment, better his position under the contract and say that the creditor must seek him out at his place. Some of the earlier decisions in India were thereafter examined one of which was *Motilal* v. *Surajmal*[1] and after considering those decisions, the Privy Council said:

"Their Lordships do not think that in this state of the authorities it is possible to accede to the present contention that section 49 of the Indian Contract Act gets rid of inferences, that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him."

This was a case where the relationship was that of a debtor and creditor. But the principle of this decision was extended to the case of a commission agent by the Rangoon High Court in *Annamalai Chettiar* v *Daw Mnin U*[2]. I may also refer to a decision of a Full Bench of this Court in *Venkatachalam Pillai* v *Rajaballi M Sajun*[3], where the plaintiff who was a resident of Tuticorin sued the defendant who carried on business at Rangoon for short-fall in goods ordered and for damages on account of the inferiority of the quality of those goods. The Full Bench held that upon an examination of the documents, it was manifest that, whatever the relationship between the parties might in fact be, payment for the goods purchased by the plaintiff or on his behalf was to be made at Tuticorin. In that view, it was found that the Tuticorin Court had jurisdiction to try the suit and the fact that the defendant had obtained payment of some of the hundies at Rangoon would not deprive the Tuticorin Court of its jurisdiction to try the suit. While this was the position, Varadachariar, J, in *Adinarayana Rao Naidu* v *Lakshminarayana Rao*,[4] having occasion to deal with a case of contract of agency, pronounced the view that the decision of the Judicial Committee in *Soniram Jeetmull* v *R D Tata and Co.*,[5] cannot be read to lay down that, as a rule of law, the principle that the debtor is bound to seek out his creditor and pay his debt is applicable in this country even for the purpose of determining the local jurisdiction of particular Courts. The facts of the case or the terms of the contract do not appear from the judgment of the learned Judge and the decision appears to have proceeded to some extent upon the obligation to render accounts and the consequent attraction to it of the provisions of section 213 of the Indian Contract Act. There was however a definite dictum in that judgment that even assuming that the English rule either in terms or by analogy could be applied in this country, it could not be extended to a case which did not arise out of the relationship of debtor and creditor and particularly to a case of agency. Lastly, reference has to be made to the decision of this Court in *Ramalinga Iyer* v *Jayalakshmi*[6]. In that case plaintiff had instituted a suit in Palghat against her husband for maintenance and against her father-in-law for the return of her stridhanam properties alleged to have been entrusted to him at the time of the marriage. From the analogy of a debtor and creditor the English rule was invoked and it was contended that the defendants being debtors had to seek out the creditor and that therefore Palghat Court had jurisdiction. The learned Chief Justice and Somayya, J, held following *Raman Chettiar* v *Gopalachariar*[7] that the

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1. (1904) I L R 30 Bom 167
2. A I R 1936 Rang 251
3. (1934) 68 M L J 504 (F B.)
4. (1940) 1 M L J 558
5. (1927) 53 M.L J 25: L R 54 I.A. 265 I L R. 5 Rang 451 (P C)
6. (1941) 1 M L.J 784
7. (1908) I L.R. 31 Mad. 223

Palghat Court had no jurisdiction and that the common law rule could not be applied in the circumstances of the case Some of the decisions referred to above were cited including *Motilal* v *Surajmal*[1] and the Privy Council decision in *Sonıram Jeetmull* v *R D Tata and Co*, *Ltd*[2] The learned Chief Justice while referring to the latter decision observed :

"It was not necessary in that case to decide whether the common law rule had full force in this country, because on examination of the terms of the contract the Privy Council considered that the suit had been instituted in the proper Court But giving full weight to the words used in the passage which I have just quoted from the judgment, the judgment goes no further than saying that section 49 does not preclude the application of the rule and does not get rid of inference, which should justly be drawn from the terms of the contract itself or from the necessities of the case In the first place the terms of the contract are to be looked at and, if they do not help, the Court must have regard to the necessities of the case in deciding whether the rule should be applied

Without considering, in what cases the rule might be conveniently applied in India, it is, in my opinion, clear that it should not be applied in the present case"

Somayya, J, while agreeing said

"If the common law rule of England is to be invoked as a mere aid in finding out the place of performance of a contract I have no objection to its being so used and that is the way in which the Judicial Committee used it in *Sonıram Jeetmull* v *R D. Tata and Co*, *Ltd*,[2] but if it is argued that in every case of debtor and creditor, the rule is to be applied without considering either the terms of the contract or the circumstances attending on it or the necessities of the case, I have no hesitation in rejecting the contention The question whether the common law rule of England is to be applied to a country of vast distances as India has to be considered with care, and it is not necessary to go into that question now"

The position as a result of the scrutiny of the various decisions examined above may be summarised thus Barring the earlier Bombay decisions, there has been a pronounced disinclination on the part of the Indian Courts to apply to this country unreservedly the general maxim that a debtor should find and pay his creditor It might, in some cases, strictly arising out of the relationship of debtor and creditor, be useful to invoke it as a matter of inference or of implication, but in the other cases and particularly in cases where the relationship is one of agency the place of payment has to be determined independently of any such general maxim with reference to the terms of the contract, the circumstances attending on it and the necessities of the case and having regard also to the statutory provisions contained in the Civil Procedure Code and in section 49 of the Indian Contract Act

I have adverted already to Ex. P-1 and Ex P-4 which contain an undertaking on the part of the defendant to pay or remit the net sale proceeds to the plaintiff If the defendant had applied to the plaintiff for appointing a place for the payment, there can, in the circumstances, be little doubt that he would have appointed his own place of business That does not necessarily mean that the defendant would have to proceed to Rajahmundry with the account or with the money and deliver it there. According to commercial usage the account copy or the money could be sent by post or according to any of the recognised commercial methods Nevertheless the obligation was on the part of the defendant to pay the money to the plaintiff at the place where he carried on his business and not on the part of the plaintiff to come to Madras and realise his dues This appears to me to be the necessary inference arising from the nature of the contract relating to payment and from the necessities of the case. The learned District Munsiff believed he had no jurisdiction because he found that the contract had been concluded at Madras with the posting of the acceptance, its performance was to be at Madras because the auction had to be held here and its alleged breach was at Madras too as the sale contrary to the directions of the plaintiff took place at Madras He however ignored the fact that the performance of the contract included the last stage of it *viz*, the rendering of the proper account and the payment of the moneys realised by the sale less the commission and expenses—an aspect which has been rightly stressed by the learned District Judge. I agree with the learned District Judge that by

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1. (1904) I.L R 50 Bom. 167.
2. (1927) 53 M.L.J 25 . L R. 54 I.A. 265 : I.L R. 5 Rang 451 (P.C)

necessary implication the defendant both in Ex. P-1 and Ex. P-4 agreed to make the payment of the moneys due to the plaintiff at Rajahmundry. In this view, part of the cause of action arose at Rajahmundry and therefore the District Munsiff's Court of Rajahmundry had jurisdiction under section 20 (*c*) of the Civil Procedure Code to try the suit

In the result the civil revision petition is dismissed with costs.

K.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Kandukuri Chellamma *alias* Mangamma and another .. *Appellants**

v.

Sri Ranganilayam Ramakrishnarao .. *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rules 72 (3) and 90—Scope—Failure to embody the valuation placed by both parties in the sale proclamation as directed by Court—Effect—Decree-holder purchasing at a subsequent sale at reduced upset price on the strength of permission to bid obtained for a prior sale at higher upset price—Discretion of Court to confirm or set aside sale—Sale subject to attack—Title to property when passes—Right of Judgment-debtor to apply for scaling down under Madras Act IV of 1938.

The Court ordered, when each party placed a different valuation on the property (which was an estate bearing a *jodi* of rupees 234) and the valuations were widely different, that the sale proclamation should embody both the valuations By some oversight this direction was not carried out and the sale proclamation merely noted the figure of the upset price which was considerably higher than the valuation given by the decree-holder and considerably lower than the valuation given by the judgment-debtors. In the sale proclamation by some oversight the decree amount was overstated. The deeree-holder obtained permission to bid and set off the amount of his decree. When the sale was held subject to the upset price there were no bidders and the upset price was subsequently reduced and the property was eventually sold to the decree-holder himself at a little over the reduced upset price The mistake as to the decree amount was discovered and the decree-holder deposited the excess of the sale price over the decree amount

On an application under Order 21, rule 90, section 47 and Order 21, rule 72 (3) of the Civil Procedure Code, to set aside the sale

Held, (*i*) It cannot be held in the circumstances that the price was inadequate or that the inadequacy, if any, was due to the omission to publish the two widely divergent estimates of the value of the property

(*ii*) The effect of the overstatement of the amount of the decree was to make the decree-holder pay more for the property he would otherwise have paid and it cannot be said that the decree-holder was put into a position to drive other bidders away.

(*iii*) Under Order 21, rule 72, Civil Procedure Code, even assuming that the leave to bid obtained before the first sale could not enure for the second sale, where the decree-holder purchases without permission the Court, may, if it thinks fit, set aside the sale There is no obligation on the Court to do so In the circumstances of the case the decree-holder had no intention to bid without permission at the ultimate sale and accordingly an order for resale was not called for

(*iv*) When the sale is still subject to attack and is being attacked, the ownership of the property remains with the judgment-debtor, subject to the possibility that in the event of the sale being confirmed that ownership will be deemed to have passed to the purchaser retrospectively with effect from the date of the actual sale The confirmation of the sale on the rejection of an application to set it aside results in the conclusion that the title of the judgment-debtor to the property is deemed to have been lost with effect from the date of the sale and as it was before the period contemplated by section 3 of Madras Act IV of 1938, the judgment-debtor was not disqualified under proviso (*D*) to section 3 (*ii*) of Madras Act IV of 1938 from applying for scaling down the decree.

Appeals against the orders of the Court of the Subordinate Judge, Ellore, in E. A. No. 440 of 1937 in O S. No. 87 of 1923, etc.

V. Rangachari for Appellants.

The Advocate-General (*K. Rajah Aiyar*) and *V. V. Chowdhary* for Respondent.

The Order of the Court was made by

Wadsworth, J.—These two matters both arise out of a decree passed in 1929 for Rs. 23,799. On 6th July, 1935, in execution of that decree, a sale was held of two items of property Item 1 was an inam village, item 2 was a less valuable property. An application was preferred under Order 21, rule 90, section 47 and Order 21, rule 72 (3) of the Civil Procedure Code, to set aside the sale. That

* A. A. Os Nos. 372 of 1943 and 634 of 1944. 24th October, 1945.
(C. R. P. No. 756 of 1943 converted into A. A. O. No. 634 of 1944).

application was dismissed by the lower Court on 6th March, 1943, in so far as it related to the first item On 18th March, 1943, the judgment-debtors filed an application under section 19 of Madras Act IV of 1938, praying the Court to scale down the decree on the footing that they were agriculturists The decree-holder objected that they were not agriculturists and that the decree had been fully satisfied by the sale which had just been confirmed. On 22nd March, 1943, the trial Court, without giving a finding on the question whether or not the applicants were agriculturists, dismissed the application on the ground that no decree subsisted Against the order dismissing the application to set aside the sale C M A No. 372 of 1943 has been filed Against the order dismissing the application under section 19 of Act IV of 1938, C R P No 756 of 1943 was preferred By reason of the amendment to Madras Act IV of 1938 under Madras Act XV of 1943, the order under section 19 has become retrospectively appealable. The Civil Revision Petition has therefore been treated as a civil miscellaneous appeal, there being no question of any payment of deficit Court fee

We will first deal with the contentions in C M A No 372 We must say at once that we do not consider that there are any grounds for setting aside the sale by reason of any material irregularity resulting in substantial injury The irregularities upon which reliance is placed are two Firstly, the Court ordered when each party placed a valuation on the property and the valuations were widely different, that the sale proclamation should embody both the valuations By some oversight this direction was not carried out and the sale proclamation merely noted the figure of the upset price which was considerably higher than the valuation given by the decree-holder and considerably lower than the valuation given by the judgment-debtors When the sale was held subject to this upset price for Rs. 30,000, there were no bidders The upset price was subsequently reduced to Rs. 20,000 and the property was eventually sold to the decree-holder for Rs. 21,000 There are really no materials upon which we can hold that the price was inadequate or that the inadequacy of the price, if any, was due to this omission to publish these two widely divergent estimates of the value of the property The other irregularity relied upon under rule 90 is based on the fact that by some oversight, the amount of the decree was overstated in the sale proclamation The decree-holder, having been allowed to bid and set off and the amount of the decree as stated in the proclamation being more than the amount of the price bid by the decree-holder, there was no cash deposit required from the decree-holder. The mistake was discovered eventually and the excess of the sale price over the true amount due under the decree was immediately deposited, but not within the fifteen days contemplated in Order 21, rule 85 of the Civil Procedure Code. Granted that there has been an irregularity in this respect, it is difficult to see how it has occasioned any injury to the judgment-debtor The effect of the overstatement of the amount of the decree was to make the decree-holder pay more for the property than he would presumably have paid otherwise and there is no basis for the assertion that the decree-holder was put into a position to drive other bidders away.

Turning to the contention that the sale should be set aside by reason of the provisions of Order 21, rule 72 (3), Civil Procedure Code, the facts are as follows. Before the first attempt to sell the property was made when the upset price had been fixed at Rs 30,000, the decree-holder filed an application for permission to bid and set off his decree. There was no objection to this prayer and permission was granted in the following words "Permission to bid for upset price fixed granted" This order is dated 20th October, 1933 On the actual date of the first attempt to sell, the Court, at the request of the decree-holder passed a specific order giving permission to set off, without any further qualification. This sale being unsuccessful there was a reduction of the upset price and a resale. Apparently by oversight there was no fresh application for leave to bid and set off. But the right of the decree-holder to bid at the sale was not questioned until after the sale had been held. The trial Court has held that the grant of permission to the decree

holder to bid "for the upset price fixed" must be read as conferring a right to bid not only at the upset price fixed at that time but at any upset price which might be fixed thereafter It seems to us that that is not a very probable interpretation of the intention of the Court when this order was passed Probably the order was so worded in order to limit the permission to the decree-holder to bid on the basis of a starting price of Rs 30,000 and not to confer an unlimited permission to bid regardless of the starting price which might be fixed thereafter However, under Order 21, rule 72, Civil Procedure Code, when the decree-holder purchases without permission, the Court may, if it thinks fit, set aside the sale. There is no obligation on the Court to do so In the circumstances of this case we are of opinion that the decree-holder had no intention to bid at the sale without permission. He was probably unaware that the permission already given did not extend to the resale and in this view we do not consider that it is a case for ordering a resale We do not, however, propose to pass any final order on C M A No 372 of 1943 at this stage, because to do so may seriously prejudice the judgment-debtors in the connected application for relief under section 19.

Turning to C R P No 756, the question whether the judgment-debtors have a right to ask the Court to scale down the decree if they can establish that they are agriculturists, has to be decided in rather different circumstances now from those which prevailed when the lower Court dealt with the matter The lower Court having confirmed the sale and no appeal having at the time been preferred against the order of confirmation, it was justified in rejecting the application for relief under the Act.

But that order itself is now appealable by reason of the amending Act and this civil revision petition which we are treating as an appeal must be regarded as a continuation of the original application. By the time this matter has come before us, the apparent finality of the lower Court's order rejecting the application to set aside the sale has disappeared and we are as an appellate Court seised of both matters The question whether the sale is or is not to be confirmed has not yet been finally decided

We have held in *Nataraja Pillai* v. *Rangaswami Karamundar*,[1] that an application under section 19 of Act IV of 1938 does lie when a sale has been held which would, if confirmed, satisfy the decree, if the application under sectin 19 is preferred at a time when the confirmation of the sale has been postponed owing to the pendency of an application under Order 21, rule 90, Civil Procedure Code. We have listened to arguments on the question whether when there is a sale and the decree-holder has been given premission to bid and set off, the decree is satisfied at the moment of the sale or only at the time when the sale is confirmed and we have been referred to conflicting decisions on the question whether in the interval between the holding of the sale and the confirmation, the decree-holder is en itled to interest on his decree or is entitled to mesne profits on the land if he is the purchaser, as throwing light on the question of the time with effect from which the decree must be deemed to have been satisfied For the purposes of the present case it is not necessary for us to go into those dicisions We are bound by the view which we ourselves have taken that when there is a sale the result of which will be to satisfy the decree, the decree is not satisfied so as to prevent the filing of an application under section 19 of Act IV, until the confirmation of the sale.

It is, however, further contended by Mr Rajah Aiyar for the respondent that even granting so much, when after the sale has been confirmed by the trial Court on the dismissal of the application under Order 21, rule 90 and an application under section 19 has also been dismissed before any appeal against the former order has been preferred the subsequent filing of an appeal against the order of confirmation would not justify the disposal of a simultaneous appeal against the order under section 19 on grounds other than those which existed when the latter application was filed We are unable to accept this contention It was held

1. (1941) 2 M L J 682.

by the Privy Council in *Chandramani Shaha* v. *Anarjan Bibi*,[1] in a case in which the trial Court dismissed an application under Order 21, rule 90 and confirmed the sale and the High Court dismissed an appeal from that order, that the date on which the sale became absolute was the date of the appellate order and not the date of the trial Court's order. Mr. Rajah Aiyar has called our attention to another decision of the Privy Council in *Juscurn Boid* v. *Pirthichand Lal Chowdhury*,[2] which at first sight appears to rest on somewhat different reasoning. That was a case in which the sale was for arrears of revenue and there was a subsequent suit by a third party contesting the validity of the sale. That suit resulted in the sale being held to be invalid This decision was on some later date confirmed on appeal Thereafter the purchaser at the revenue sale brought a suit for the refund of the purchase price on the ground of failure of consideration and the question was what was the date of the cause of action *i e.*, the date on which the consideration failed. Their Lordships held that it was the date on which the sale was set aside by the trial Court and not the date on which that decision was confirmed by the appellate Court. It is to be noted that their Lordships were not then considering the question which we now have to decide, namely, when the sale becomes absolute under the provisions of Order 21, Civil Procedure Code. In our opinion the decision in *Chandramani Shaha* v. *Anarjan Bibi*[1] applies to the facts of the present case The validity of the sale to the respondent is still in question and until the question is finally decided by the order of this Court, the sale cannot be said to have become absolute In such circumstances it seem to us that the appeal must be regarded as a continuation of the proceedings in the lower Court to set aside the sale and on the analogy of our decision in *Nataraja Pillai* v. *Rangaswami Karamundar*,[3] we must hold that the application under section 19 will lie during the pendency of the appeal and though it was dismissed before the appeal was filed, when we are seised of both matters in appeal here and the appeal from the order confirming the sale has not been decided, we must hold that the application under section 19 will lie provided that the applicants can establish that they are agriculturists.

In this view therefore we remand C.R.P. No. 756 of 1943, to the trial Court for a finding on the questions :

(*i*) Whether the applicants are agriculturists ;

(*ii*) If so, what will be the result of applying the provisions of the Act to he decree against them

Three months' time for finding and one week thereafter for objections Final order on C M.A. No 372 of 1943 will be passed after receiving and considering the finding of the trial Court on this matter.

(In pursuance of the aforesaid Order, the trial Court submitted a finding that the applicants are hit by *proviso* (*D*) to section 3 (*ii*) of Madras Act, IV of 1938 and for that reason they cannot have any relief under the Act.)

After the return of the finding, the Court delivered the following judgment

Wadsworth, J.—In our previous judgment in these two cases we expressed the view that A A O No 372 of 1943 which is an appeal against an order dismissing an application to set aside a sale in execution of a decree would have to fail ; but we refrained from passing a final order to this effect because of the pendency of the connected appeal which could only be maintained on the footing that the execution of the decree in question was not closed by the adjustment of the sale price. In A.A.O. No 634 of 1944 which comes on after a finding regarding the agriculturist status of the appellants, the question is whether the appellants are entitled to scale down the decree in execution of which the properties have been sold by the sale which is attacked in the connected appeal. The trial Court has

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1. (1934) 67 M L J 79 L R 61 I A 248 . I L R. 46 Cal 670 (P C.)
I.L.R. 61 Cal 945 (P C) 3 (1941) 2 M.L J 682.
2. (1918) 36 M.L.J 557 L.R 46 I.A. 52 .

found that the appellants are both of them disqualified from the status of agriculturists by reason of *proviso* (*C*) and *proviso* (*D*) of section 3 (*ii*) of the Madras Act, IV of 1938. The learned Judge has found that the appellants as a family have been assessed during the relevant years to property tax in respect of buildings or lands situated within the municipality of Ellore of a rental value exceeding Rs 600. He has also found that the appellants are landholders of an estate under the Madras Estates Land Act in respect of which quit rent or jodi exceeding Rs. 100 is paid. Both these findings are challenged by the appellants.

The first appellant is the widow of one Veerasalingam who died in 1928. The second appellant is the son adopted by the first appellant under a power given to her by the will of her late husband Veerasalingam had a divided brother Murtiraju who died in 1922 leaving a daughter Subbamma who filed a suit, O.S. No. 53 of 1934, claiming a half share in the properties of her father and her uncle Her case was based on an assertion that though the properties were undivided the two brothers were divided in status In that suit Subbamma succeeded and she was given a half share in the properties the ownership of which is a material factor in deciding the agriculturist status of the present appellants. There can be no doubt that the aggregate rental value of the properties and lands within the Ellore Municipality belonging to the family of the appellants and Subbamma is very much in excess of Rs 600 per annum But there are certain complications which have not been given due consideration by the learned trial Judge The house property in respect of which tax has been paid on an annual rental value of Rs 500 in 1935-36 and of Rs. 672 in 1937-38 is property in respect of which the appellants were not as a result of the partition suit entitled to more than a half share. If the first appellant was actually made to pay the tax on the full value of this property, she must in the light of the decree in the partition suit be deemed to have paid it as to a half on behalf of her co-tenant, her husband's niece Subbamma. There are however other lands in respect of which property tax was recovered. The important items are T S Nos. 203 and 206/1 It is fairly clear that No 203 is an agricultural land The cultivation account, Ex P-8, for fasli 1344, that is to say just before the relevant period, shows that there was a water application in respect of the whole extent of this number and that nearly a half of the number was actually cultivated by water taken from the canal In fasli 1346 (1936-1937) the cultivation account shows that there was again a water application for this number though there was no actual cultivation ; and in the following year 1937-1938 one acre of this number, that is a little over one-third of the total extent was planted with rain-fed maize. On these materials it is fairly clear that No. 203 measuring 3 44 acres remained agricultural land notwithstanding the fact that it was situated within the municipality and was generally referred to by the first appellant in an affidavit as a site along with other lands No doubt it was a potential building site ; but it has been used as agricultural land during the relevant period.

Regarding No 206/1 measuring 7.54 acres the position is not quite so clear. In 1934-35 it is shown as waste There is a note of " water application " which indicate that water was applied for and refused We have no information regarding the use of the land in fasli 1345 but in fasli 1346 there is a note that the land was " banjar " or waste In fasli 1347 it is noted in the cultivation account that 1 50 acres of this number was cultivated with brinjal, irrigated by water from a private well It is clear that this cultivation must have been in the half share allotted to the appellants by the partition decree ; for the commissioner's report in the partition suit indicates that there is a well which has a channel serving the land allotted to the appellants On these materials, notwithstanding the fact that T.S. No. 206/1 has been mainly lying waste and is situated within the municipality and has been generally described as a site along with other lands, it seems to us clear that this is an agricultural land which is likely to be converted into a building site in future but has not yet been so converted. If these agricultural lands are excluded having regard to the figures summarised in the lower Court's

finding it will be clear that the finding that the appellants are disqualified from the status of agriculturists by reason of *proviso* (*C*) is not correct.

The learned Subordinate Judge has also found that they are disqualified under *proviso* (*D*) by reason of their ownership of the village of Tedlam which bears a jodi of Rs 234 This village was brought to sale by the respondent in execution of the decree and it is the sale of this village which is under attack in the connected appeal The sale was held in 1935 and a petition was filed under Order 21, rule 90, attacking the sale as bad by reason of various alleged irregularities We have already indicated our view that the attack on the sale must fail, but we have not yet passed orders setting aside the sale The question is whether in this state of affairs the appellants can be deemed to have been the landholders of the village at the commencement of the Agriculturists' Relief Act, having regard to the definition of "landholder" in the Madras Estates Land Act as a person owning an estate or part thereof It appears that the actual possession of the estate is now with a receiver appointed in the execution proceedings, but we have no precise information as to the date of his appointment.

It has been argued for the appellants by Mr. Rangachari that by reason of certain observations in the decision of the Privy Council in *Bhawani Kuwar* v *Mathura Prasad Singh*,[1] the sale must be deemed to have conveyed the ownership to the decree-holder at the very moment when it was held, regardless of the fact that it has been pending confirmation for something like 10 years owing to an attack made by the the appellants themselves on the validity of the sale We have read the decision just referred to with care and can find nothing in it to justify the conclusion that their Lordships were intending to lay down that in all sales in execution, regardless of the question whether there was or was not any attempt to get the sale set aside under rule 89 or rule 90 of Order 21, the ownership of the property passed to the successful bidder as soon as the auction was concluded It seems to us that their Lordships were in that case considering the position when the sale was in fact not challenged and had already become absolute by reason of the passage of time and the actual promulgation of the confirmation order. They were not concerned with the position which arises when either the judgment-debtor makes a deposit of the purchase price within the thirty days allowed in rule 89 or when some person interested attacks the sale as an irregular proceeding resulting in material loss The contention that in all cases, regardless of confirmation, title passes to the purchaser as soon as the auction is concluded is difficult to reconcile either with the language of section 65 of the Civil Procedure Code or with the phraseology used in rule 89 of Order 21 as it stood before its amendment in Madras The latter provision has received very full consideration by a Full Bench of this Court in *Sundaram* v. *Mausa Mavuthar* [2] It seems to us that the whole reasoning of the learned Judges who constituted that Full Bench rests on the assumption that, whatever may be the position after confirmation, when the sale is still subject to attack and is being attacked, the ownership of the property remains with the judgment-debtor, subject to the possibility that in the event of the sale being confirmed that ownership will be deemed to have passed to the purchaser retrospectively with effect from the date of the actual sale

We have already indicated that in our view the sale of Tedlam village was a good sale which should be confirmed In that view, seeing that we must now pass an order confirming that sale, we are driven to the consequential conclusion, that, whatever might have been the position if the sale had been set aside, in the view that we take, the confirmation of the sale necessarily results in the conclusion that the title of the appellants to that estate is deemed to have been lost with effect from the date of the sale, that is to say, with effect from a date anterior to the period contemplated in section 3 of the Madras Act, IV of 1938

The result, therefore, is that A A O No 634 of 1944 must be allowed and the decree must be amended on the lines laid down in the finding of the lower

1 (1912) 23 M L J 311 L R 39 I A 228 I L.R. 40 Cal 89 (P C)

2. (1921) 40 M.L J 497 I.L R 44 Mad 554 (F.B).

Court which will result in the decree being satisfied and A A. O No 372 of 1943 will be dismissed and the sale confirmed The appellants will receive costs in Appeal No 634 of 1944 including the costs of the finding and will pay costs in Appeal No 372 of 1943

K S *C M A No* 634 *of* 1944 *allowed*;
C M A. No 372 *of* 1943 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. SIDNEY WADSWORTH, *Officiating Chief Justice*, AND MR JUSTICE KOMAN

Jagadeesam Pillai .. *Appellant**

v.

Kuppammal .. *Respondent.*

Madras Estates Land Act (I of 1908) *(as amended by Act XVIII of* 1936), *section* 3 (10) *and section* 6—*Private land—Test—Occupancy rights—When available*

Explanation 2 to section 6 of the Madras Estates Land Act as amended in 1936 makes it clear that in respect of an inam village which was not an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, but became an estate by virtue of that Act, the expressions "new" and "commencement of this Act" shall be read as meaning the 30th June, 1934, and the expression "hereafter" shall be considered as meaning the period after the 30th June, 1934.

A ryot who has acquired an occupancy right by being in possession of his holding on the 30th June, 1934, is not entitled to an occupancy right thereafter regardless of whether or not he continues to hold the land Section 6 (1) gives the ryot a permanent right of occupancy in his holding If he has no holding he can have no right of occupancy

Where on the termination of a lease the landlord without objection from the former tenant gave a fresh lease to another and at the end of that lease admitted the son of the second lessee to possession as tenant the inference is that the previous lessees surrendered the land at the end of the period of their leases and the person subsequently admitted into possession as tenant gets the right of occupancy contemplated by section 6 of the Act

The definition of "private land" in section 3 (10) as amended by the Act of 1936 read as a whole indicates clearly that the ordinary test for "private" land is the test of retention by the landholder for his personal use and cultivation by him under his personal supervision.

In respect of such lands, there must be something in the evidence either by way of proof of direct cultivation or by some clear indication of an intent to regard such lands as retained for the personal use of the landholder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Madras Estates Land Act cannot acquire occupancy rights The mere fact that the landlord owns both the varams in the lands and has been letting them out on short term leases is not sufficient to warrant such lands being treated as private lands

History of the Tanjore Palace Estates reviewed

Appeal against the decree of the Court of the Subordinate Judge of Tanjore, dated 15th March, 1944, and passed in O.S. No. 19 of 1943.

V Govindarajachari, B. V. Ramanarasu and *V. Srinivasan* for Appellant.

The Advocate-General (*K Rajah Aiyar*) and *A. Sundaram* for Respondent.

The judgment of the Court was delivered by

The Officiating Chief Justice—The respondent has obtained a decree for the possession of the village of Kaduveli which is a part of the Tanjore Palace Estate. The appellant who is the tenant claims that the suit lands are situated in an estate governed by the Madras Estates Land Act and that he has occupancy rights therein and cannot be evicted The trial Court has held that, whatever was the position before the amendment of the Madras Estates Land Act by the Madras Act XVIII of 1936, the lands must now be deemed to be part of an estate under the Estates Land Act. It has also negatived the claim of the plaintiff that these are private lands within the definition in section 3 (10) of that Act. But it has held that the defendant is not entitled to resist the plaintiff's claim for possession because the occupancy right in these lands is held not by the defendant but by a previous tenant. In appeal it is contended that this finding regarding the subsistence of the

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* Appeal No. 296 of 1944. 21st September, 1945.

occupancy right of the previous tenant is erroneous; but the respondent contends that even granting so much, the appellant must fail because the lower court erred in holding that the lands in suit are not private land.

In order to understand the question arising in this suit it is necessary to summarise very briefly the history of the Tanjore Palace Estate. In 1799 the then Raja of Tanjore by treaty ceded to the East India Company the right to collect revenue of the lands in the Tanjore Country and to administer justice therein. The Raja retained control over the Fort of Tanjore and was also permitted to retain certain villages and lands and palaces This state of affairs continued up to the death of the last Raja in 1855 On his death, there being no heir, the Court of Directors of the East India Company decided that the title of Raja had become extinct and the whole of his propety including some 190 villages lapsed to the East India Company. Accordingly in October, 1856, Mr. H Forbes appointed for the purpose, took possession of the entire estate.

The senior widow of the last Raja then filed a bill in equity in the Supreme Court at Madras against the East India Company claiming to be entitled to succeed to the whole of her late husband's estate. She succeeded before the Supreme Court, but on appeal to His Majesty in Council it was held that the seizure of this estate, including the public and private property of the late Raja, was an act of the sovereign power which could not be questioned in the municipal Courts and the claim of the widow was therefore rejected After this decision the widows of the late Raja presented a memorial in which they asked for a grant of the properties of the late Raja to his heirs as an act of grace and justice By an order dated the 21st August, 1862, passed under the instructions of the Government of India which had succeeded the East India Company, the equitable claim of the Raja's widows and daughter was recognised and the whole of the lands were relinquished in their favour. It was ordered that the estate should be made over to the senior widow to be managed by her and she was required to provide in a suitable manner for the participative enjoyment of the estate in question by the other widows— her co-heirs ; and on the death of the last surviving widow, the daughter of the late Raja, or failing her the next heirs of the last Raja, if any, would inherit the property. The Government Agent at Tanjore was directed to place the senior widow in possession of the property. Vide *Chota Raja Saheb* v. *Sundaram Aiyar*[1].

In 1866 litigation commenced between the Ranees and a receiver was appointed by the Court. The whole of the villages belonging to the Tanjore Palace Estate remained in the possession of receivers from 1866 down to 1912 when the last receiver filed an inter-pleader suit, O S. No. 26 of 1912 on the file of the Subordinate Judge of Tanjore, which subsequently became O S No. 3 of 1919 on the file of the District Court of Tanjore That suit resulted in the allotment of the village of Kaduveli to the 28th defendant in that suit Subhanandaji Bhonsle Saheb , but the properties were subject to a charge and in execution of the decree for the charge the properties were brought to sale and purchased by the present plaintiff in Court auction on the 2nd September, 1940. The plaintiff therefore claims title as the successor of one of the heirs of the grantees to whom the estate was restored by the Government of India.

The village of Kaduveli forms part of a vattam or group consisting of Kaduveli village proper and the hamlet of Punnavasal The earlier document indicating the tenure of this village is the paimash account of 1830, Ex. D-1. This shows that Kaduveli village including the hamlet of Punnavasal comprised river-bed wet land which was enjoyed by several mirasdars " as long as the moon and the sun last." In Kaduveli village three shares are shown as belonging to the Annachatram and one share to Miras Chinna Appu Muppan ; and one share was apparently divided between Ramanatnayyan Setti and Jagannadha Joshi. There is also a recital that two of the mirasdars entitled to Jagannatha Joshi's share namely, Ananda

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1. (1936) 71 M L.J. 41 L.R. 63 I.A. 224 : I.L.R. 59 Mad. 633 (P.C.)

Pillai and Chidambaram Pillai, had sold one fourth of the Kaduveli lands to Sirkla Mosi Sarase Rao Kedike Saheb who appears to have been an estate official It is provided that the Mirasi rights of Punnavasal lands should be retained by Ananda Pillai and Chidambaram Pillai and one fourth share of the Mirasi right in Kaduveli should be entered in the name of the purchaser Whatever be the precise effect of these paimash entries, they make it abundantly clear that in 1830 the village consisting of Kaduveli and the hamlet of Punnavasal was a mirasi village in which the occupancy right subsisted in individuals other than the landlord

There is no further documentary evidence until the year 1858 which falls within the period after the seizure of the estate by the Crown and before its restoration to the heirs of the deceased Raja Ex. P-13 is the Ilaka Jamabandi Chitta for Fasli 1267. It shows that the dry lands of Kaduveli village were held on a three years lease by one Appu Pillai Chidambaram Pillai, not apparently the old mirasdar, on a cash rent of Rs 485 and the wet lands of the same village were held on a similar lease by the same lessee who was entitled to what is called a *purakudi varam* of one-fifth of the produce, that is to say, he was treated not as a mirasdar, but as a mere cultivating tenant In Punnavasal hamlet the mirasi right of three fourths of the village was treated as belonging to the Sircar and the lands were let to cultivating tenants , whereas one-fourth mirasi right was held by the original mirasdar Chidambaram Pillai and the son of the other original mirasdar Ananda Pillai No term is given for the period of their tenancy.

In Fasli 1270, *i e* , 1860-61 when the village was still under the control of the Government, we have Ex. P-15 which is the Thunduvaram Jamabandi Chitta in respect of Sircar Miras lands in the village of Kaduveli. The term '*thunduvaram*' ordinarily indicates the share of the produce which goes to the mirasdar as distinguished from the *melvaram* which goes to the landlord and the *purakudivaram* which goes to the cultivating sub-tenant. This account shows that the Kaduveli lands were held on a three years lease by Ekambaram Pillai The total *beriz* is given. From this is deducted the *melvaram* and service *manyam melvaram* and the balance is treated as *miras thunduvaram* , that is to say, the yield of the lands is apportioned so as to show separately the amount which goes to the estate as representing the landholder, the amount which is payable to the service inamdars and the amount which the estate takes as also the holder of the mirasi right. In the hamlet of Punnavasal, the three *pangus* of sircar miras are treated in a similar way.

Ex. D-9 is the Jamabandi Chitta of Kaduveli village for Fasli 1273 and is dated the 30th June, 1864 It contains a reference to damage by floods to the lands belonging to the one-fourth mirasi holder in Punnavasal, Ananda Pillai, Chidambaram Pillai, and also similar damage to the lands belonging to the Palace miras It also refers to a lease of the Palace miras, wet and dry lands in Kaduveli village for three years to one Arumuka Nadan, whose name clearly shows that he cannot be an heir of any previous mirasdar, he being of a different caste, and particulars are given of the receipt as Palace miras *thunduvaram* out of the lands in the enjoyment of artisans and servants. From this document it is clear that Punnavasal was still being treated as being a hamlet of which the mirasi rights were held as to three-fourths by the Palace and as to one-fourth by the representatives of the original mirasdars, whereas Kaduveli was treated as a village in respect of which the Palace owned the mirasi rights and leased the lands for a term of years to a tenant.

This state of affairs seems to have continued throughout the period during which the receivers held the lands The subsistence of private mirasi right in one-fourth of Punnavasal was continuously recognised and the other three-fourths in that village was treated as belonging to the Palace and the tenants took the lands for short periods under leases An attempt has been made to deduce from one muchilika Ex. P-16 dated the 30th July, 1873, a state of affairs in which the Kaduveli wet lands were actually under the direct cultivation of the receivers. Ex. P-16 is a muchilika executed by the cultivators of the lands. It recites that Kaduveli was "*in amani*" during the fasli and the cultivators received an advance of Rs. 350

for purchasing seeds for wet lands and that they undertook to return that amount in instalments Far from this being evidence of direct cultivation, it seems to us very clearly to be evidence that the land was cultivated by lessees on a sharing system which is the ordinary meaning of the term "*amani*" The fact that the cultivators received an advance for the purchase of seeds is the clearest possible indication that the lands were not cultivated by hired servants of the landlord.

It is unnecessary to go into the details of the subsequent leases of Kaduveli lands. Upto the time of the passing of the Madras Estates Land Act in 1908, there is no indication that the lands were regarded as home-farm lands of the estate, unless such an indication can be spelt out of the words

"belong to and remaining in the enjoyment of the estate"

found in some of the lease deeds. An attempt has been made to argue that the Tamil word "sonthamana" which literally means "own," indicates something more than mere ownership and is used to refer to the 'private' nature of the tenure of the lands as distinguished from ordinary lands in which the estate claimed no right of personal enjoyment of the soil We find ourselves unable to agree to this suggestion It is, however, clear that the receivers granted leases for these lands and in some cases they granted leases before the termination of the previous lease, probably owing to abandonment by the previous lessee ; and that though there is nothing to indicate that the estate regarded these lands as home-farm lands, they were clearly regarded as different from lands held by mirasdars and were lands in respect of which the lessee had no right of occupancy The Jamabandi account for 1901, Ex P-22 shows clearly that the Kaduveli lands were held on muchilikas which were term leases, whereas the one-fourth mirasi lands privately owned in Punnavasal were referred to as being held on a permanent lease, while the three-fourth Palace miras of that hamlet were given on a lease for a period After the passing of Madras Act I of 1908 the leases in respect of Kaduveli lands contained a recital that the lands formed private lands remaining throughout in the enjoyment of the estate

On the 14th May, 1929, when the estate was in the control of an usufructuary mortgagee, the immediate predecessor of the present defendant, Raghunatha Ingle, executed a lease muchilika, Ex P-11, in favour of the mortgagee That document contains a recital that the tenant will not sub-lease the lands without permission, that the leased lands do not form part of an estate within the definition in Madras Act I of 1908 and that the tenant has no occupancy right in the lands leased and should surrender the lands on the termination of the lease In 1931 the defendant's father, Visvanatha Pillai, took a sub-lease for three years from Raghunatha Ingle Ex P-11 (*a*) is the muchilika relating to that lease and it contains similar recitals admitting that the lands demised did not form part of an estate under Act I of 1908 and that the sub-lessee had no occupancy right in the land The lease granted to Raghunatha Ingle terminated at the end of Fasli 1344 and on the 24th May, 1934, the sub-lessee, Visvanatha Pillai, presented a petition to the landlord Subbanandaji Bhonsle, Ex D-2, in which he asked for a direct lease of those lands for three years. This was duly granted and is evidenced by Ex D-3 These documents do not indicate what had happened to the previous lessee, Raghunatha Ingle The natural inference is that he had surrendered his lease and was not asking for a renewal, the term of the lease having expired

The three years lease given to Visvanatha Pillai would last until May, 1937. On the 27th December, 1937 we have what is described as a statement in writing given by the present defendant to the receiver then in charge of the lands which recites an oral lease in his favour of the land on condition of his payment of Rs 140 cash and 225 kalams of paddy for Fasli 1347 It is common ground that from Fasli 1347 onwards the defendant has been the lessee of the lands originally leased to his father

On these facts the learned Subordinate Judge has given a decree to the plaintiff, not on the ground that the lands are private lands of the estate, which was the case asserted in the plaint, but on the strength of the theory, of which the pleadings contain

no suggestion, that though there is an occupancy right, that right was held not by the defendant or his father, but by the previous tenant, Raghunatha Ingle, who is presumed to have been the tenant of the holding on the 30th June, 1934, the date contemplated in the second explanation to section 6 of the Madras Estates Land Act as amended in 1936. It seems to us that the learned Subordinate Judge has misunderstood the effect of section 6 of the Act. The first sub-section is as follows :—

> "Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land situated in the estate of such landholder shall have a permanent right of occupany in his holding"

and Explanation (2) makes it clear that in respect of an inam village which was not an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, but became an estate by virtue of that Act, the expressions "now" and "commencement of this Act" shall be read as meaning the 30th day of June, 1934, and the expression "hereafter" shall be considered as meaning the period after the 30th day of June, 1934 The learned Subordinate Judge seems to propound a theory that if once a ryot has acquired an occupancy right by being in possession of his holding on the 30th June, 1934, that occupancy right will enure for him thereafter regardless of whether or not he continues to hold the land This seems to us clearly to be a fallacy and a very dangerous fallacy, for, if it were correct, it would enable a landlord to keep a nominal occupancy ryot to whom he did not look for the payment of rent and to treat the person admitted to possession of the holding by himself as a mere tenant at will, which would defeat the whole object of the amending Act of 1936 Section 6 (1) gives the ryot a permanent right of occupancy *in his holding* If he has no holding, he can have no right of occupancy The natural inference from the facts of the present case whereby on the termination of the lease of Raghunatha Ingle the landlord without objection from the former tenant gave a fresh lease to the defendant's father and at the end of that lease admitted the defendant himself into possession as tenant, is that Raghunatha Ingle surrendered the land at the end of the period of lease and that the defendant's father did the same at the end of the period of his lease. There is no evidence whatever to indicate that Raghunatha Ingle had any holding in the land after the termination of his lease. Unless it were established that he continued to be the tenant of the land, notwithstanding the grant of a lease to the defendant's father, the occupancy right would be lost to him. It is abundantly clear that a ryot can surrender his land, and if he does so he loses the occupancy right, for he has lost the holding We are therefore unable to agree with the learned Subordinate Judge in his view that the defendant, though he was admitted into possession by the landlord, did not thereby get the right of occupancy contemplated in section 6 of the Act

The learned Advocate-General who appears for the respondent, while not conceding that the view of the learned Subrodinate Judge on the question of occupancy right is wrong, rested his case mainly on the contention that the learned Subordinate Judge erred in holding that the suit land is ryoti land. His contention is that the land is private or home-farm land which is excluded from the definition of "ryoti land" and that therefore the admission of the defendant to possession of that land did not confer on him any right of occupancy The learned Subordinate Judge rejected a similar contention before him mainly on the ground that there is clear evidence that Kaduveli village was originally a mirasi village and that there was no proof of direct cultivation of the land by the landholder or of any circumstances clearly indicating that the land had been converted into private land For this part of his argument the learned Advocate-General had laid great emphasis on the fact that by the act of state in 1859 the Crown confiscated all the rights held by the late Raja in the whole estate including his private property therein The argument is that, granting the subsistence of mirasi rights when the suit village was held under the Raja of Tanjore, the act of state put an end to all proprietary rights and the title which the plaintiff now holds must be

traced back, not to the title of the last Raja of Tanjore, but to the title conferred by the grant from the Crown in 1866 On this basis it is contended that the subsistence of a mirsai right in 1830 is not relevant and what we have to consider is the effect of the grant to the heirs of the late Raja of the estate which, so far as the main village of Kaduveli was concerned, was clearly a grant of both the melvaram and the kudivaram It is argued that starting from this point, we have a village in which the grantee clearly held both the varams and that from 1866 onwards it has been made abundantly clear that the grantee never treated the main village of Kaduveli as ryoti land The leases were all given for terms and were frequently cancelled before the term had expired and the whole course of conduct of the Government before the grant and of the receivers who represented the estate after the grant is consistent only with the theory that no occupancy right was regarded as subsisting, the lands being regarded as the private property of the estate in which the grant of a lease conferred no further rights than those specified in the contract. Emphasis is laid on the fact that the tenants were not allowed to cut trees, not allowed to grant subleases without permission and were obliged to surrender the land on the termination of the lease

We shall consider first the effect of the confiscation of the property of the late Raja of Tanjore in 1859 and its regrant to the heirs of the Raja in 1862 We must remember that we are not now concerned with a case in which a former proprietor is trying to enforce against the Crown a title derived from a previous sovereign It is no doubt well settled that in such circumstances municipal Courts can enforce against the new sovereign only such rights as had been conferred or recognised by the new sovereign after the act of state changed the sovereignty The cases quoted on the subject were the Tanjore Palace case—*The Secretary of State in Council of India* v. *Kamachee Boye Sahaba*[1], *Vajesingji* v. *Secretary of State for India*[2], *Cook* v. *Sprigg*[3], *Secretary of State* v *Bai Raj Bai*[4], and *Secretary of State for India* v. *Sardar Rustan Khan*[5] The authority of these cases leaves no doubt that when the properties of the Raja of Tanjore were confiscated by the Crown, if the Crown had purported to confiscate also the proprietary rights of the mirasdars holding under the Raja of Tanjore, these mirasdars could not in the local Courts have established as against the Crown the subsistence of their rights, except to the extent to which the Crown had regranted those rights or recognised their continuous subsistence.

It does, however, seem to us clear from the documents in this case that when the Crown confiscated the assets of the Raja of Tanjore, it did not purport to confiscate the rights of the mirasi proprietors other than the Raja himself. It is clear that the subsistence of the mirasi right in one-fourth of the lands of the Punnavasal hamlet was not confiscated by the act of state which deprived the Raja's heirs of his lands ; and even with reference to the Raja's lands, although there was a confiscation of all his properties, the Crown continued to recognise the subsistence of mirasi right in those properties, by treating separately the income from the melvaram and from the mirasi right, a similar recognition is found when the estate was given back to the heirs of the Raja. In the hamlet of Punnavasal private mirasi rights still subsisted and it was clearly recognised that in the rest of the lands, the mirasi rights also subsisted as such, though held by the estate itself ; and the same seems to have been the position with reference to the main village of Kaduveli, though the recitals are not so clear in regard to this village because no private mirasdar remained. We do not know how the Raja of Tanjore acquired the mirasi rights in the mains village of Kaduveli ; but we may take it as established that after the rendition of the estate there was no recognition of the subsistence of any occupancy right in any tenants of the main village who were holding lands under the receivers or under the actual owners of the estate The recital in leases executed after the coming into force of Act I of 1908 of words to the effect that

1. (1859) 7 M I A 476
2. (1924) 47 M L J 574 L R 51 I.A 357 : I L R 48 Bom 613 (P.C)
3. (1899) A.C 572.
4. (1915) 29 M L J 242 L R 42 I A 229 : I L R 39 Bom 625 (P C.)
5. (1941) A C 356

the land was the private land of the Zamindar were obviously inserted with an eye to the provisions of the Act and cannot have any evidentiary value

It is not really necessary for us to determine whether or not the village of Kaduveli including the hamlet of Punnavasal formed an estate under the Madras Estates Land Act as it stood before the amendment of 1936 The Full Bench which decided *Sundaram Ayyar* v *Ramachandra Ayyar*[1], answered in the affirmative the question whether the Tanjore Palace Estate was an estate under the Madras Estates Land Act, I of 1908 This decision has in some cases been distinguished on the ground that only one village was then under the consideration of the Court, but in terms the answer of the Full Bench appears to include the whole of the estate. There is much to be said for the view that when the grant is considered as a whole, it must be regarded as a grant of the land revenue to a person not owning kudivaram in the land, although it can be shown that in the case of individual lands in the estate the kudivaram interest which had been previously owned by the Raja was included in the rendition to his heirs Whatever be the effect of the application of the Madras Act I of 1908 to this estate, all doubt is removed by the passing of the amending Act in 1936

If we assume that the title of the palintiff is to be traced solely to the grant of 1862 without reference to the existence of a mirasi tenure under the previous owner, can it be said that on the facts proved in this case the lands in Kaduveli come within the definition ' of private land' in section 3 (10) of the Act? Under the Madras Estates Land Act as it stood before the amendment of 1936 ' private land ' was defined as "the domain or home-farm land of a landholder by whatever designation known such as khambattam, khas, sir or pannai". Section 185 of the Act provided that

> " When in any suit or proceeding it becomes necessary to determine whether any land is the landholder's private land, regard shall be had to local custom and to the question whether the land was before the first day of July, 1898, specifically let as private land and to any other evidence that may be produced, but the land shall be presumed not to be private land until the contrary is shown, Provided that all land which is proved to have been cultivated as private land by the landholder himself, by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act shall be deemed to be the landholder's private land "

When dealing with the question whether land which had once been ryoti land can have been legally converted into private land before the passing of the Estates Land Act, a Bench consisting of Wallis, C J., and Seshagiri Ayyar, J, in the case of *Zamindar of Chellampalli* v *Somayya*[2], held that such a conversion should be proved by very clear and satisfactory evidence The learned Chief Justice in holding that the evidence adduced was not sufficient for the purpose quoted the case of *Budley* v *Bukhtoo*[3] in which it was held that *sir* land was land which a Zamindar had cultivated himself and intended to retain as resumable for cultivation by himself even when from time to time he demised it for a season The learned Chief Justice applied the same test and held that the plaintiff had failed to satisfy it. This decision came on before the Privy Council on appeal in *Yarlagadda Mallikarjuna Prasad Nayudu* v *Somayya*[4] and their Lordships quoted the above passage from the judgment of the Chief Justice with approval pointing out that this test is obviously suggested by section 185 of the Act The judgment of Wallis, C J, in the case just quoted also considers the meaning of the words "domain or home-farm land of a landholder by whatever designation known," and points out that the dictionary meaning of the word " domain " is " the land about the mansion-home of a lord and in his immediate occupancy " Seshagiri Ayyar, J, on the same subject quotes from the Encyclopaedia Brittanica in support of the view that the word " domain " means " land immediately surrounding the mansion or dwelling house, the park or chase," and expressed the view that it was in a similar sense that the Legislature used the expression These decisions are quoted in an unreported case in *Tiruvarur*

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1 (1917) 32 M L J 333 I L R 40 Mad 389 (F B)
2 (1914) 27 M.L J 718 I L R 39 Mad 341.
3 (1871) N W P H C R 203
4 (1918) 36 M L J 257 L R 46 I.A 44 I L.R 42 Mad 400 (P.C).

Sri Tyagarajaswami Devasthanam Rajan Kattalai v *Muthuswami Odayar*[1] on which the learned Advocate-General has relied, and are distinguished on the ground that they only relate to cases in which the land which was originally ryoti land was claimed to have been converted into private land The learned Judges in the unreported case dealt with the more elaborate definition of private land given in section 3 (10) of the Madras Estates Land Act as amended in 1936 in order to arrive at a decision on the facts of that particular case that land which had never been ryoti land and which was shown to have been treated in many respects as if it were ryoti land, could come under the heading of domain or homefarm land by whatever designation it is known, even though there was no proof that there had been actual cultivation by the landholder The learned Judges deal with the definition in a way which, with very great respect, we find difficult to reconcile with the decision of the Privy Council just quoted We are not concerned with the correctness of the unreported decision on the particular facts before the learned Judges ; but with some of the observations contained in that judgment we must express our respectful disagreement The definition of " private land " in section 3 (10) as amended by the Act of 1936 is as follows

" Private land (*a*) in the case of an estate within the meaning of sub-clauses (*a*), (*b*), (*c*) or (*e*) of clause (2) means the domain or home-farm land of the landholder by whatever designation known, such as *khambattam, khas, sir or pannai* and includes all land which is proved to have been cultivated as private land by the landholder himself, by his own servants or by hired labour, with his own or hired stock, for a continuous period of twelve years immediately before the commencement of this Act , and (*b*) in the case of an estate within the meaning of sub-clause (*d*) of clause (2), means—(1) the domain or home-farm land of the landholder, by whatever designation known, such as *khambattam, khas, sir* or *pannai* , or

(*ii*) land which is proved to have been cultivated as private land by the landholder himself, by his own servants or by hired labour, with his own or hired stock, for a continuous period of twelve years immediately before the first day of July, 1908, provided that the landholder has retained the kudivaram ever since and has not converted the land into ryoti land, or

(*iii*) land which is proved to have been cultivated by the landholder himself, by his own servants or by hired labour, with his own or hired stock, for a continuous period of twelve years immediately before the first day of November, 1933, provided that the landholder has retained the kudivaram ever since and has not converted the land into ryoti land , or

(*iv*) land the entire kudivaram in which was acquired by the landholder before the first day of November, 1933, for valuable consideration from a person owning the kudivaram but not the melvaram, provided that the landholder has retained the kudivaram ever since and has not converted the land into ryoti land, and provided further that, where the kudivaram was acquired at a sale for arrears of rent, the land shall not be deemed to be private land unless it is proved to have been cultivated by the landholder himself, by his own servants or by hired labour, with his own or hired stock, for a continuous period of twelve years since the acquisition of the land and before the commencement of the Madras Estates Land (Third Amendment) Act, 1936 "

We are now concerned with sub-clause (*b*) of that definition In that sub-clause, the first paragraph describes private land as the domain or home-farm land of the landholder, by whatever designation known, and certain vernacular equivalents are given The Legislature did not use the words " domain or home-farm land " without attaching to them a meaning ; and it is reasonable to suppose that they would attach to those words the meaning which would be given to them in ordinary English In ordinary English usage the term domain or home-farm, as is indicated by the judgment in *Zamindar of Chellapalli* v. *Somayya*[2], would connote land appurtenant to the mansion of the lord of the manor, kept by the lord for his personal use and cultivated under his personal supervision, as distinct from lands let to tenants to be farmed without any control from the lord of the manor other than such control as is incident to the lease. It seems to us that the sub-clause (*b*) (1) of the definition is intended to cover those lands which come obviously within what would ordinarily be recognised as the domain or home-farm , that is to say lands appurtenant to the landholder's residence and kept for his enjoyment and use The home-farm is land which the landlord farms himself as distinct from land which he lets out to tenants to be farmed. This first clause therefore is meant to include and signify those lands which are in the ordinary sense of the word home-farm

1 A A O No 311 of 1943 • 341
2 (1914) 27 M L J. 718 · I L R 39 Mad

lands. The other clauses of the definition appear to deal with those lands which would not necessarily be regarded as home-farm lands in the ordinary usage of the term, for instance lands which are at a distance from the domain or home-farm but have been cultivated personally by the landlord for the required period of years, or lands in which the entire tenant's right has been purchased by the landlord from the tenant when the land has never been treated as ryoti land since the purchase; and with reference to those lands there is a proviso that lands purchased at a sale for arrears of revenue shall not be regarded as private lands unless cultivated directly by the landlord for the required period It seems to us that the definition read as a whole indicates clearly that the ordinary test for 'private' land is the test of retention by the landholder for his personal use and cultivation by him under his personal supervision No doubt such lands may be let on short leases for the convenience of the landholder without losing their distinctive character, but it does seem to us to be inconsistent with the scheme of the Madras Estates Land Act as amended to treat as private those lands with reference to which the only peculiarity is the fact that the landlord owns both the varams in the lands and has been letting them out on short term leases There must in our opinion be something in the evidence either by way of proof of direct cultivation or by some clear indication of an intent to regard those lands as retained for the personal use of the landholder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Madras Estates Land Act cannot acquire occupancy rights

It seems to us that there are no materials in the present case to show that those lands have been so cultivated or retained by the landholder It is said that they are situated within a mile or two of one of the palaces in the estate; but they were not in origin home-farm lands, before the seizure of the estate from the Raja, and seeing that the estate has been under successive receivers almost continuously since the re-grant, there is no evidence that the grantee treated those lands as lands kept for his personal use and occupation or cultivated them under his personal supervision Seeing that the lands cannot come under any other clause of the definition than clause (*b*) (i) of sub-section (10) of section 3 and having regard to the fact that the presumption is in favour of the ryoti character of the lands, we must hold that the plaintiff has failed to prove that the lands are private lands

It follows from these findings that the appeal must be allowed with costs here and in the Court below and the plaintiff's suit dismissed.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

The Official Receiver of South Arcot, representing Somasundaram Chettiar, insolvent in I P. No 10 of 1928, on the file of the District Court, South Arcot *Appellant**

v

V. RM K. M M Kulandaivelan Chettiar and others . *Respondents.*

Custom—Nattukottai Chettiar community—Stridhanam of married woman—Son whether entitled to joint interest to exclusion of daughter—Deposit of stridhanam amount in name of another—Trust if constituted—Limitation Act IX of 1908, *S* 10—*Applicability—Insolvency of banker—Right to apply for tracing order.*

The plaintiff's mother was married to the second defendant *M* in 1897 At the time of the marriage, stridhanam was given to her by her brother in the shape of a hundi which was handed over to *M's* father The proceeds were credited in the name of *M* in the head office accounts of the family firm After the partition between *M's* father and his brothers in or about 1900 the amount was held in the business by *M's* father's branch of the family which continued undivided In 1908 the said amount with accrued interest was transferred to the money lending firm of the maternal uncle of *M*, and was there held in the individual vilasam of *M* In 1929 the maternal uncle of *M* was adjudged insolvent and the mother of the plaintiff unsuccessfully applied to recover the stridhanam amount

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* Appeal No. 129 of 1944. 15th August, 1945

as trust property On the death of the mother in 1935 the plaintiff continued the proceedings instituted by his mother but his claim to recover the stridhanam amount on the footing that it was trust property was ultimately negatived In 1939 the plaintiff instituted the present suit for recovery of the stridhanam amount from the Official Receiver alleging that the deposit constituted a trust and that he was the beneficiary thereof He claimed that he was entitled to a joint interest in the fund even during the lifetime of his mother and that he discovered only in 1938 that the amount had been fraudulently adjusted for the satisfaction of the private debts of *M*

Held, there was no custom among the Nattukottai Chettiar community by which the sons acquired a joint right in the stridhanam property of the mother during her lifetime to the exclusion of her daughters

Held also, that in asmuch as the plaintiff was claiming rights through her mother his claim was barred by *res judicata* by reason of the earlier proceedings instituted by the mother and continued by the plaintiff unsuccessfully as her legal representative.

Held further, that in the circumstances the plaintiff was in any event not entitled to recover the amount as trust money as the relationship between the parties was that of debtor and creditor and there was no breach of trust on the part of the insolvent in adjusting the amount towards the liability of *M*

Even where a banker accepts a deposit of trust money with knowledge of the trust as an investment in his firm, he does not become a trustee of that money in the sense of that expression and S 10 of the Limitation Act cannot apply to such a case

Appeal against the decree of the Court of the Subordinate Judge, Devakottah, dated 4th September, 1943, in O S. No. 182 of 1939

S T. Srinivasagopalachari and *K. R Rangaswami Aiyangar* for Appellant

R. Gopalaswami Aiyangar and *K. Srinivasan* for Respondents

The Judgment of the Court was delivered by

Patanjali Sastri, J—This appeal raises a question of some general importance to the Nattukottai Chettiar community of Southern India, *viz*, whether a son is entitled by the custom of the community to a joint interest in his mother's stridhanam during her lifetime

The plaintiff's mother Deivanai Achi was married to Muthappa Chetty, the second defendant in the suit in 1897 At the time of the marriage, stridhanam was given to her by her brother in the shape of a hundi for Rs 3,062-8-0 which was handed to Muthappa's father, Muthiah Chetty The proceeds were credited as usual in the name of the second defendant in the *oorkadai* (head office) accounts at Devakottai where Muthiah Chetti's family was carrying on money-lending and banking business under the *vilasam* V. RM K with branches at Madura and other places. After the partition between Muthiah Chetty and his brothers in or about 1900 the amount appears to have been held by Muthiah Chetty's branch of the family which continued undivided and assumed the *vilasam* V RM K. M According to the plaintiff, a sum of Rs 5,143-6-3 out of the stridhanam fund, which by that time had amounted with accrued interest to Rs. 8,643-6-3, was transferred in October 1908 to the A. PR. S SM money-lending firm at Villupuram of Somasundaram Chetty, the maternal uncle of the second defendant, and was there held in deposit in the individual *vilasam* of the second defendant. V. RM K. M. M. Somasundaram Chetty was adjudicated insolvent by the District Court, South Arcot, in February 1929 and his estate including all the assets of the Villupuram firm vested in the appellant herein, the Official Receiver, South Arcot, who was the third defendant in the suit Somasundara died in 1932 and soon after his death Deivanai Achi initiated proceedings before the Official Receiver for recovery of Rs. 40,324-5-6 made up of the said sum of Rs. 5,143-6-3 and accrued interest Rs. 35,180-15-3 claiming that "according to the custom of our community the money payable to me should be deemed as a trust fund for legal purposes" and should be paid in full. The Official Receiver rejected the claim on the grounds that it was not satisfactorily made out, that there was no trust and that the claim was barred by limitation Deivanai Achi filed a petition, C. M. P. No 459 of 1932, by way of appeal to the Insolvency Court. Agreeing with the Official Receiver, the learned District Judge dismissed the petition on 20th November, 1933, and thereupon Deivanai Achi preferred an appeal, A A. O. No 90 of 1934, to this Court. During the pendency of that appeal Deivanai died in November 1935, and the present plaintiff as her son applied to this Court in C M. P. No. 175 of 1936 to implead him as the legal representative of his deceased mother alleging

that "according to the custom prevailing among the Nattukottai Chetties I am the sole heir to the stridhanam amounts left by the deceased" and that he was willing to implead Thenammai Achi his sister as a party respondent "to avoid any possible dispute from the respondent" The application was ordered and the plaintiff was added as the second appellant and Thenammai Achi as the third respondent in the appeal On 1st October, 1937, this Court agreed with the District Judge that Deivanai Achi failed to prove her claim and dismissed the appeal without going into the question of limitation.

The plaintiff now sues in the Court of the Subordinate Judge, Devakottah, for the recovery of the same amount, *viz*, Rs 5,143-6-3 with interest up to date of suit on substantially the same allegations except in regard to two particulars. He now alleges that the trust created in respect of the stridhanam moneys was, according to the custom of the Nattukottai Chettiar community, for "the benefit of Deivanai Achi and her male children and, in their absence, her female children," and that after the death of Deivanai Achi in 1935 he became "the sole beneficiary under the trust" In other words, he claims that he became entitled to a joint interest in the fund even during the lifetime of his mother under the very terms of the original gift. These terms, admittedly, were never expressed or reduced to writing but are, it is said, to be implied from the custom alleged. He further avers that he discovered only in December 1938 that Somasundaram Chetti, either in collusion with the second defendant and Muthiah Chetti or otherwise, purported to adjust the trust moneys towards debts owed by them to Somasundara's firm by making fraudulent entries in the accounts and thereby committed a breach of trust. The plaintiff claims that his cause of action dates from such discovery.

The defendants 1 and 2 did not contest the suit, but the third defendant representing the estate of Somasundaram Chetti filed a written statement pleading, *inter alia*, that the suit, so far as he was concerned, was not maintainable without the permission of the Insolvency Court which has refused permission, that the claim was barred by limitation and that it was *res judicata* by reason of the decision in the claim proceedings instituted by Deivanai Achi in the Insolvency Court. Issues 6, 7 and 8 were raised on these pleas and were tried as preliminary issues, the parties being allowed to file such documents as they relied upon in regard to these issues The Court held that the plaintiff's claim was barred as *res judicata* and that the suit was not maintainable in the absence of permission by the Insolvency Court. It accordingly dismissed the suit without considering the other issues arising in the case

The plaintiff thereupon appealed to this Court which by its judgment dated 28th April, 1943, set aside the dismissal and remanded the suit to the trial Court to be decided on the merits The Court pointed out that the plaintiff's case was different from the case set up by his mother who averred that the trust fund was her own stridhanam, whereas the plaintiff now claimed that the trust fund was constituted for the benefit of the issue of the marriage as well as of the mother. The plaintiff therefore did not claim the money through his mother and the doctrine of *res judicata* had no application. The Court further held that no leave of the Insolvency Court was required as the suit had been filed on the basis that there was a trust fund in the hands of Somasundara the insolvent and that the plaintiff was entitled to a charge on the assets of the entire estate now vested in the third defendant. The plaintiff thus claimed to be a "secured creditor" as that term was defined in section 2 (*e*) of the Provincial Insolvency Act and no leave was therefore necessary under section 28 of the Act.

After the remand both sides filed additional documents and the plaintiff examined four witnesses including himself. No oral evidence was adduced on the side of defendants. The learned trial Judge has now found all the other issues in favour of the plaintiff and decreed the suit as prayed for with sundry directions regarding the Court-fee payble to the Government as the suit was filed *in forma pauperis*. From this decree the third defendant has brought this appeal.

The main question involved in the appeal relates, as already stated, to the custom alleged by the plaintiff in regard to stridhanam gifts made to a Nattukottai Chetty woman. The custom is stated in para 3 of the plaint in these terms

> "It is customary in the Nattukottai Chetty community to which the parties belong for the parents of a girl to give her money presents (stridhanam) both at the time of her marriage and subsequently whenever there is any event of importance either in her family or her husband's family, and it is the custom and usage to hand over such money in the shape of cash or hundies to the senior member of the family of the girl's husband and to vest the same in them to be held in trust and invested for the benefit of issues of the marriage, *i e*, male children and in their absence females, with a right of reversion to her parents in the event of her dying without issue It is also usual for the said moneys to be invested in the *vilasam* of the husband out of respect and courtesy "

Though the trust is stated here to be for the benefit of the children and the mother is not mentioned as a beneficiary, it is admitted that she also has beneficial interest in the fund.

It is common ground that no instrument of trust was executed, nor was any trust expressly declared at the time of the gift. The trust has to be inferred from the conduct of the parties and the surrounding circumstances. The law of trusts is codified in this country in the Trusts Act (II of 1882), and under section 6 of that Act, there can be no trust unless the beneficiary is indicated with "reasonable certainty." Who then is beneficiary of this alleged trust? According to the plaintiff, it is not only the bride to whom the presents were made as stridhanam but also others to be ascertained according to an alleged custom of the community It seems to us that no trust can be said to have been effectually constituted where the beneficiaries are left to be determined by invoking a custom

Assuming it however to be possible to create such a trust, it is necessary to see whether the custom which is at variance with the Hindu Law governing women's rights in their stridhanam has been established by clear and unambiguous evidence and has been shown to be so ancient, uniform and well-recognised as to have become part of the consciousness of the community The burden of proof rests on the plaintiff who sets up the custom in derogation of Hindu Law In examining the evidence these principles have to be borne in mind.

Two witnesses have been called to prove the custom Muthukaruppan Chettiar (P. W. 2) the plaintiff's grandfather's younger brother, says:

> "The stridhanam amounts are always credited in the husband's name The wife has no right to spend the money On failure of issue the money reverts to the bride's family . A woman who is given stridhanam has no right to spend the stridhanam moneys as she pleased when she has issue During the woman's life the stridhanam moneys cannot be taken by her sons The woman has only the right to collect the money, but not to spend the money if she has heirs She can spend the money where she has heirs but should duly account to the children for the amount I am not aware of any Nattukottai Chetti contending that his mother is not entitled to her stridhanam amount "

The other witness Subramaniam Chetti (P. W. 3) says:

> "Stridhanam is given to girls at the time of their marriage in our community It is mostly given in the shape of hundies . The hundies are usually given to be treated as *asthi* (fund) for the girl and for the children born of the marriage The husband has no manner of right to the said money The girl has no right to spend the money as she pleased but, if the condition of the family requires money to be spent and if there is issue for whom it has to be spent, she can do so with the consent of her parent's family A wife is entitled to institute a suit herself for recovery of the money She has no right to make a gift of the money There is no such custom If she makes a gift of it that gift would not be valid Until she has children she or her husband has no right to the amount If she wanted to dispose of it by gift etc, she would have to obtain the consent of her parents' family For expenses of the family or for expenses of the marriage of her children she has absolute right to spend the money as she pleased, and it is unnecessary for her to obtain the consent of her parents' family "

It will be seen that the evidence of these witnesses as to the respective rights of a woman and her children in the stridhanam money is vague, discrepant and contradictory, and in some respects also inadmissible as the witnesses have been made to answer what appear to be questions of law. They make no differentiation between the male and female issue of the marriage. While the evidence may indicate a general consciousness in the community that the stridhanam fund should enure also for the benefit of the children born of the marriage, a consciousness evidently

due to the well-known fact that a Nattukottai Chetti woman rarely spends her stridhanam money but allows it to accumulate with the accretions of interest as she is usually well looked after in her husband's family, it falls far short of establishing any specific and uniform custom whereby the male issue born of the marriage become entitled to an interest in the stridhanam of their mother even during her life and that to the exclusion of the female issue No instance of a son or daughter having claimed and obtained a share in the mother's stridhanam or of having exercised any right thereto as a co-owner of the fund during her life has been proved. And though numerous suits by Nattukottai Chetti women for recovery of their stridhanam moneys have come before the Courts from time to time, in no case has it been shown that the sons or daughters were joined as parties interested in the subject matter as one would expect to find if the alleged custom were so well established and recognised in the community as the plaintiff would have the Court believe Indeed, the plaintiff's own conduct in relation to his mother's claim proceeding does not support his case

Mr Gopalaswami Aiyangar drew our attention to several decisions of this Court which he claimed were instances where the custom was judicially recognised and acted upon It is on the strength of some of these decisions rather than on the evidence adduced in the case that the learned Subordinate Judge appears to have upheld the custom We find, however, on a close examination of these cases that none of them lends any support to the custom now set up by the plaintiff. In the *Official Assignee, Madras* v *Muthayee Achi*,[1] the mother herself sued for recovery of her stridhanam moneys from the assets of her husband in the hands of his assignees in insolvency She claimed the amount (principal and interest) in full on the ground that her father-in-law, to whom the sums were originally handed over by her parents, and after his death her husband, held the fund as trustees and that it could be traced into and formed a charge on the assets In support of the trust put forward she pleaded " that it is the practice and usage to hand over such moneys to the senior member of the family of the girl's husband and to vest the same in him to be held by him in trust for the girl and her issue by the marriage with a right of reverter to her parents in the event of her dying without issue " The learned Judges remarked that the finding by the trial Court in favour of the plaintiff as to the custom alleged by her was supported by clear and overwhelming evidence and was indeed not questioned before them. Dealing with the point as to whether the plaintiff's father-in-law became a trustee in respect of the amounts of the hundies handed over to him, they observed " The evidence shows that moneys in the form of hundies are given at the time of the marriage by the bride's parents' family into the hands of the father-in-law of the bride for investment in business *for the benefit of the bride and the children that may be born to her after the marriage* . . The amounts are to be allowed to accumulate by lending them out for interest and the aggregate of the principal amounts and interest is payable on demand to the bride *for the use of herself and her children*" (italics ours) Two things must be observed in relation to this case. In the first place, no question arose as to the rights *inter se* between the mother and her children in regard to the stridhanam The dispute was as to whether a trust had been created at all and not as to who were the beneficiaries The learned Judges stated their conclusion thus " In these circumstances we have no doubt that the hundi amount received by the first defendant's father must be viewed as constituting a trust fund *in favour of the plaintiff* to be held by the first defendant's father as a trustee *for her benefit*" (italics ours). As this passage is somewhat inconsistent with the earlier one quoted above as there is no reference to the children of the marriage, we sent for the records of the case and perused the evidence adduced in regard to the custom put forward Almost every witness examined on the point made it clear that the stridhanam amount belonged to the bride and was payable to her whenever she made a demand for payment, that it would be taken by her

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1 (1937) M W.N. 493.

children after her death and that it would revert to her parents' family if she died without issue Such being the evidence before the learned Judges the statement in general terms in the earlier passages that the stridhanam fund was held for the benefit of the bride and her children cannot reasonably be taken to mean that the children had joint rights in the fund even during the lifetime of their mother The learned Judges could only be taken to have meant that the fund would in the ordinary course enure to the advantage of the mother as well as her children, the beneficiaries taking not jointly but successively In the second place, even if the statement were to be taken as indicative of the co-ownership of the mother and her children, it would be of no assistance to the plaintiff in this case as the custom set up by him postulates joint rights in the male issue alone to the exclusion of the female issue It is true that in some cases it has been held that, according to the custom of the community, the stridhanam passes on the mother's death to her male issue and it is only if she dies leaving no such issue, that it passes to her daughters. But this cannot be regarded as supporting or rendering probable in any way the existence of joint rights in the son to the exclusion of the daughter *during the mother's life* As pointed out in *Palaniappa Chettiar* v. *Chockalingam Chettiar*,[1] you cannot establish a custom by evidence of similar or analogous customs or enlarge a proved custom by parity of reasoning The only proof of custom is the evidence of that custom and no other.

The other decisions relied on for the plaintiff *viz.*, *Muthuraman Chettiar* v. *Periannan Chettiar*,[2] *Palaniappa Chettiar* v. *Nachiappa Chettiar*,[3] and *Subramania Iyer* v *Sivakami Achi*,[4] do not advance the plaintiff's case any further. In none of them did any question arise as to the rights *inter se* between the mother and her children. General language used as to the stridhanam fund being intended for the benefit of the bride and the children to be born of the union is not inconsistent with the mother taking as the sole beneficiary and her sons or daughters, as the case may be, succeeding her as her heirs.

On the other hand, in C S. No 242 of 1939 Krishnaswami Ayyangar, J, held, after an elaborate review of the evidence in the case and the decisions referred to above, that no such custom as is now put forward by the plaintiff was established. " In a loose sense," observed the learned Judge " the stridhanam money may be described as a provision in the nature of a family settlement inasmuch as the families both of the bride and the bridegroom join in making presents which enure directly no doubt to the benefit of the bride but indirectly and ultimately for the benefit of her children and even perhaps of her husband. But none of the cases in this or in the Subordinate Courts of the Presidency has so far recognised a custom by which the bride is to have no beneficial interest in her stridhanam money," (the custom was put forward originally in that case, as here, in that extreme form) " or if she has she must share it with her own children even during her life." In A.S. No. 360 of 1942 this Court upheld the right of a Nattukottai Chetti woman to dispose of her stridhanam by will and held that a custom alleged to the contrary was not proved. The learned Judges affirmed the decision of the Subordinate Judge of Sivaganga who, after an exhaustive discussion of the voluminous evidence in that case, recorded his conclusion thus

"Nattukottai Chetti women take their stridhanam same as under the Hindu law, originally invested with suitable bankers who are relations, it carries good rates of interest and is payable to the woman herself on demand, whether she has issue or is issueless, her powers of disposition *inter vivos* by gifts, presents and endowments for charitable or other objects are unquestionable and have not been shown to have been repudiated, it follows as a necessary and inevitable corollary that she has powers to bequeath, even as Unnamalai Achi has done in the present suit, and no custom in derogation of any of the above rights has now been established "

These decisons are inconsistent with the custom set up by the plaintiff.

If then the plaintiff has failed to prove that he was a joint beneficiary in his own right under the trust constituted in respect of his mother's stridhanam, he can

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1 (1929) 57 M.L.J. 817
2. (1934) 67 M.L.J. 317.
3 (1941) 2 M.L.J 558.
4. (1944) 1 M.L.J. 38.

only be regarded as claiming through her, and his present suit to recover the same amount which h s mother sought to recover in the claim proceedings in the Insolvency Court instituted by her and continued by him unsuccessfully as her legal representative in this Court, must fail. As has been stated, it was held in those proceedings that the plaintiff's mother failed to prove her claim on foot of a deposit made on her behalf in the insolvent's firm. That finding is conclusive and bars the present claim as *res judicata*

It is however, urged that this result does not follow for two reasons In the first place, the discovery of the alleged fraudulent adjustment of the stridhanam amount in the accounts of the insolvent's firm towards the amount due to that firm from the plaintiff's father and grandfather is said to have given rise to a fresh cause of action in December, 1938 after the termination of the previous proceedings. This is an obvious fallacy The decision of the insolvency Court that the plaintiff's mother failed to establish that her stridhanam amount was held by Somasundaram Chetty as a deposit in his firm strikes at the very root of the plaintiff's claim, for if there was no deposit of the stridhanam in that firm, the story of its fraudulent adjustment must fall to the ground, and any new cause of action, even if one arose, cannot avail the plaintiff Secondly, it was contended that the insolvency Court had no jurisdiction to adjudicate on the mother's claim as she would, on the allegations in her petition, by a "secured creditor" being entitled in law to a charge on the assets of the firm in the hands of the receiver in insolvency and her rights as such were not affected by the insolvency proceedings. Reliance was placed on section 28 (6) of the Provincial Insolvency Act which provides that the power of a secured creditor "to realise or otherwise deal with his security" is not affected by the debtor's adjudication We see no force in this argument. It is to be noted that the plaintiff's mother was not in the position of an ordinary secured creditor holding a mortgage or charge on any specific asset of the insolvent. If her case that the stridhanam was a t ust fund in the hands of Somasundaram Chetty was true she would in law be entitled to a charge on the total assets of the insolvent out of which she could claim to be paid in full. There was no question of her "realising" or "otherwise dealing" with her security without recourse to the insolvency Court which had control of all the assets of the insolvent, and, in fact, she did seek her remedy in that Court The receiver could not effectually distribute the assets among the unsecured creditors of the insolvent without settling the claim of the plaintiff's mother who had applied for payment in full of the amount alleged to be due to her In such circumstances, the matter came peculiarly within the cognizance of the insolvency Court and that Court had complete jurisdiction to decide the question under sub-section (1) of section 4 of the Act, and its decision is final and binding under sub-section (2) on the plaintiff as a person claiming through or under her

Though this is sufficient to dispose of the appeal, we proceed as the case may not stop here, to indicate our opinion on the other points argued before us

According to the decisions to which we have already referred, it must be inferred from the conduct of the parties and the surrounding circumstances that a trust was created in favour of the plaintiff's mother in respect of the proceeds of the hundi handed over by her brother to her father-in-law Muthiah Chetty at the time of her marriage The evidence shows that the bride and her husband were minors at the time and that the bride's brother executed the hundi and gave it to Muthiah Chetty who was the manager of the family and the natural protector of the girl after the marriage, for the purpose of investment and augmentation with accretions of interest as usual among the community It is also clear that Muthiah Chetty invested the moneys in his own family money-lending business which was then carried on under he vilasam VR M K at Madura and the amount stood at Rs. 3,120-14-6 as on the 17th Avani, Hevilambi, corresponding to 31st August, 1897 So far, the plaintiff's case on the merits is smooth-sailing. It encounters, however, some rough weather at the next stage when the plaintiff seeks to prove that a sum of Rs. 5,143-6-3 out of the augmented fund was transferred in

October 1908 to the A. PR.S.SM firm belonging to Somasundaram Chetti and that the latter accepted the amount with knowledge of the trust and subsequently adjusted it towards the debt due to him from the plaintiff's family All that clearly appears is that on 25th October, 1908, Muthiah Chetty passed a hundi for Rs. 5,143-6-3 to the A.P.R S SM. firm The hundi, a copy of which is filed as Ex. B, recites that the sum was payable " under the settlement made by our Muthappan " (i e , the second defendant) " so as to be credited in the name of *thanathu* (self) " Somasundaram Chetty cashed the hundi and credited the proceeds in the *vilasam* of the second defendant (V. RM K M M) in the accounts of his A PR S SM. firm at Villupuram . On the same date, *viz.*, 25th October, 1908, another Hundi for Rs 3,500 was given by Muthiah Chetti to Somasundaram Chetti's brother Chinniah Chetti who was carrying on a money-lending business of his own under the *vilasam* A PR S C at Tirukoilur This hundi has not been produced but it is referred to in Ex G a letter written by Chinniah The accounts of the A PR.S. SM. firm show that the amount credited in the name of the second defendant swelled to Rs 6,626-7-5 with accumulated interest by October, 1913, and on the 16th of the same month that sum was debited to the second defendant cancelling the credit and an equivalent sum was credited in the account of the second defendant's family headed VR M K M (which represents the *vilasam* of Muthiah Chetti), reducing the debit balance in that account which had been considerably overdrawn In other words, the amount standing to the credit of the second defendant was adjusted towards the debt due to the firm from the family of the second defendant

Now, three things must be established before the plaintiff's case can succeed · (1) The sum of Rs 5,143-6-3 handed over by Muthiah Chetti to Somasundara on 25th October, 1908, was part of the stridhanam fund held by him as trustee for the plaintiff's mother. (2) Somasundara received it knowing it to be trust money, and (3) the adjustment of 1913 was made by Somasundara with the knowledge that such application of the trust money was unauthorised and constituted a breach of trust The only documentary evidence on which the plaintiff relies in support of points (1) and (2) is Ex L, which, if genuine, would clearly establish those points It is said to be a draft of a hundi proposed to be drawn on 16th October, 1908, by Muthiah Chetti in favour of the second defendant for Rs 8,643-6-3 " in respect of the stridhanam amount paid to self by V T M people (i e , the family of Deivanai Achi's parents) and in respect of the sundry amounts paid in the account," the latter apparently representing *seermurai* or small presents made to her after her marriage It will be seen that the total of the two hundis drawn by Muthiah Chetti on 25th October, 1908, for Rs 5,143-6-3 and Rs 3,500 in favour respectively of Somasundara and his brother Chinniah is Rs 8,643-6-3, and this sum is referred to in Ex L as the stridhanam moneys paid by the family of Deivanai Achi's parents That document would thus supply, if it were genuine, the only link connecting the sum paid into the hands of Somasundara in October, 1908, with the stridhanam of the plaintiff's mother, apart from the oral evidence to which we shall presently refer Furthermore, the document, which is said to be in the handwriting of Somasundara himself, would also prove that he was aware that the sum of Rs 5,143-6-3 paid to him was part of the stridhanam fund And yet it was not produced at the inquiry held by the Official Receiver in the claim proceeding instituted by the plaintiff's mother in the insolvency Court Muthiah Chetti who admittedly conducted that proceeding on her behalf and gave evidence (Ex VIII) in support of her claim, made no reference to any such document having been brought into existence in the manner now spoken to by the plaintiff's witnesses P W. 2 and P. W 4. It was produced for the first time before the insolvency Court when Muthiah Chetti was again examined (his deposition is marked as Ex IX) in the appeal against the order of the Official Receiver rejecting the claim It is written on a small scrap of paper and is not signed by any one, and admittedly no hundi was executed and delivered in accordance with its terms There was thus no particular reason for preserving such an inconsequential piece of writing for over a quarter of a century Muthiah Chetti who produced it at a late stage in the insolvency proceedings,

though alive, was not examined His brother P W. 2 and the plaintiff's father, the second defendant, who was examined as P. W 4 both say they were present when the draft Ex. L was prepared, but while according to the one it was written by Chinniah Chetti, the other says it was written by Somasundara himself Chinniah is alive but has not been called We have carefully compared the writing in Ex L with the admitted handwriting of Somasundara in the postscript added by him in Ex F written two days later, but we are unable to form any definite opinion one way or the other In these circumstances, we cannot but regard Ex. L with grave suspicion The learned Judge below apparently regarded Ex. L as a hundi executed by Muthiah Chetti, for he says " Ex. L was then executed by the plaintiff's grandfather V. RM. K. M for the said sum in the following terms etc " (para. 8) This is an obvious error and it must necessarily have influenced his conclusion regarding the genuineness of the document For the reasons indicated we do not, however, consider it safe to act upon it.

Putting aside Ex. L, we have, in regard to the three points mentioned above, only the oral evidence of P. W 2 and the second defendant (P W.4) and the previous depositions of Muthiah Chetti, Exs VIII and IX which appear to have been admitted by consent These witnesses state that the stridhanam of Deivanai Achi had, by October 1908, amounted to Rs 8,643-6-3, that at the instance of her brothers it was at first proposed to invest the whole of it in Somasundaram Chetti's firm and the draft Ex L for a hundi for that amount was accordingly prepared, but the proposal was then dropped and a portion of the amount, *viz*, Rs. 5,143-6-3 only, was deposited in Somasundara's firm and the balance of Rs. 3,500 in the firm of his brother Chinniah Chettiar Ex B and G no doubt show that these deposits were made, but they do not refer to the amounts as the stridhanam moneys of Deivanai Achi The explanation of P W 2 that this was " on account of confidence " cannot be accepted as satisfactory Chinniah Chetti is said to have been present at the time when these transactions took place and is thus in a position to give direct evidence on the point, but as already stated he has not been examined, nor has any evidence been produced to show how the sum of Rs 3,500 deposited with him on the same day was dealt with subsequently The witnesses examined are near relations of the plaintiff We are not prepared to hold, on their interested testimony, that the sum of Rs. 5,143-6-3 deposited in the second defendant's *vilasam* in Somasundaram Chetti's firm with which the second defendant and his father had admittedly large dealings of their own, was part of Deivanai Achi's stridhanam amount and that Somasundara received it as such

Even assuming that to have been the case, two further questions remain to be answered Did Somasundara know or have reason to believe that Muthiah Chetti or the second defendant was committing a breach of trust in authorising, as one or both of them must be taken to have done, the adjustment of the stridhanam moneys towards their private debts ? If so, would the plaintiff be entitled to payment in priority with a charge on the total assets as claimed by him, or only to rank for a dividend with the other creditors of Somasundara in the insolvency proceedings ?

As regards the first of these questions, on the assumption made above, the burden of proving that Muthiah Chetti had authority to apply the trust money in payment of his private debts would lie on Somasundara now represented by the third defendant. (Vide *O RM. O. M SP Firm* v *Nagappa Chettiar*,[1]). P. W 2 states that when the stridhanam hundi was given to Muthiah Chetti there was no agreement as to how it should be invested He says, however, that it is the usual practice to invest it either in the bride's family firm or the bridegroom's family firm or with third parties In the present case the money remained invested without any one concerned raising any objection, in Muthiah Chetti's family firm till October 1908, when it was deposited in the A. PR S SM firm of Somasundaram Chetti. It may therefore be inferred that Muthiah Chetti had authority to invest the trust money in his own family firm The adjustment entry dated 16th October, 1913,

1. (1941) 1 M L J 393 . L R. 67 I A 448 I L R 1941 Mad 175 (P C)

in the account of Somasundara's firm, Ex. K-(1) says "received from V. RM K. M. M after crediting towards letter." Asked to explain what the letter referred to was, the second defendant denied that there was any such letter This denial cannot be accepted as true It was probably the letter whereby Muthiah Chetti and the second defendant in whose name the amount had been credited authorised the adjustment in reduction of their overdraft. The account also shows, and it is admitted by the second defendant, that there was a settlement of account on 25th April, 1916, the second defendant and his father executing a promissory note for Rs. 20,171 in favour of Somasundara for the balance then found due in respect of the dealings between their firms While it is thus clear that the adjustment of 1913 was effected with the knowledge and concurrence of the second defendant and his father, there is nothing to show that the money was replaced in their family firm either by depositing cash or by otherwise augmenting its assets The second defendant states that the accounts at Devakottah, the headquarters of the family business "must be with my father" These accounts may throw light on how the stridhanam was dealt with in the family accounts after the adjustment aforesaid But they have not been produced. We are asked by the appellant's learned Counsel to infer that if the accounts had been produced they would have disclosed a replacement of the fund, in which case the adjustment would not be open to attack We are not however prepared to draw any such inference in the circumstances of this case. It is in evidence that the family fortunes began to decline from 1908 or 1909 when Muthiah Chetti started the construction of a house on an expensive scale, though the actual crash came some time later, the second defendant being adjudicated inslovent in 1923 and his father Muthiah in 1928 In 1916 we find, as stated already, the second defendant and his father executing a promissory note for a large sum in favour of Somasundaram even after the adjustment of 1913. In such circumstances, we are unable to infer from the non-production of the family accounts relating to the period in question that the amount adjusted in Somasundara's accounts must have been replaced in Muthiah Chetti's family firm Nor can we hold that Somasundaram Chetti who was the maternal uncle of the second defendant and presumably knew the financial condition of Muthiah Chetti's family could have reasonably believed that the amount adjusted was being replaced and there was no breach of trust

What then is the legal position? Proceeding on the same assumption, *viz*, that the hundi for Rs 5,143-6-3 was part of the stridhanam fund and that Somasundaram Chetti received it knowing it to be such, it cannot be asid that Somasundara himself became a trustee in respect of the money when he received it in 1908. He was only a banker accepting a deposit with notice of the trust. Mr. Gopalaswami Ayyangar, however, argued on behalf of the plaintiff that the adjustment of 1913 amounted to a transfer of the money to Somasundaram Chetti and that the plaintiff was entitled to trace and follow it into the general assets of Somasundara now in the hands of the third defendant with a right of lien on the total assets We cannot accede to this contention It is true that the adjustment and set off effected by Somasundara could not, in view of what we have said, bind the plaintiff as the beneficiary of the trust-fund and that Somasundara would be liable to refund the money deposited with him But we cannot agree that Somasundara would, on that account, be in a worse position than he was in before such adjustment, as regards the quantum of his liability Prior to the adjustment, the deposit, albeit of trust money as such, created only the relation of creditor and debtor between the trustee, Muthiah Chetti and his banker Somasundara (*Foley* v *Hill*,[1]) and there would be no question, on the latter's bankruptcy, of the trustee tracing or following the money in the hands of the assignee in insolvency, as the money was part of Somasundara's estate and vested as such in the assignee The fact that Somasundara set off his liability as a banker to repay the trust money against a private liability of the trustee to himself knowing or having reason to believe that the trustee was committing a breach of trust cannot

1 (1848) 2 H L C. 28.

improve the position of the beneficiary. If a trustee is not entitled to a tracing order in his banker's insolvency, not because of any difficulty of following money into a debtor and creditor account like a banker's, for such difficulty is got over in equity by declaring a charge (See *Sinclair* v. *Brougham*[1]), but because the trustee depositor is only entitled to payment *pari passu* with the other unsecured creditors of the banker who had no notice of any breach of trust when he received the deposit, it is difficult to see on what principle a set off by the banker, in the circumstances supposed, of his liability to repay against a private debt of the trustee could entitle the *cestui que trust* to payment in full with a charge on the total assets in the hands of the assignee. The set-off would, of course, not bind the *cestui que trust* who might sue to have the fund replaced if there was no bankruptcy, but against the assignee he would be entitled only to a right of proof. It would be different if instead of a set-off, the banker had actually received trust-money in payment of his debt with notice of the trust

It follows that the plaintiff is not entitled to claim as a secured creditor with a charge on all the assets of Somasundaram Chetti in the hands of the third defendant, and the present suit brought on that footing without the leave of the insolvency Court is also not maintainable.

There remains only the question of limitation Assuming, again, as we must for this purpose, that Somasundaram Chetti accepted a deposit of trust-money with knowledge of the trust as an investment in his firm, he did not, as already observed, become a trustee of that money in the strict sense of that expression and section 10 of the Limitation Act cannot therefore apply It has been recently held in *Chidambara Vinayagar Devastanam* v *Chidambaram Chettiar*,[2] by a Division Bench of which one of us was a member that the word " trust " is used in section 10 in the same sense as in the Trusts Act (II of 1882) and that the expression " vested in trust " implies that the ownership in the property has been conveyed to the person referred to in the section The learned Judges reviewed the earlier cases on the subject and expressed their disagreement with the observation (which they regarded as an *obiter dictum*) in *Krishtappa Chetti* v *Lakshmi Ammal*,[3] that the expression " trust for a specific purpose " in section 10 was merely a more expanded mode of expressing the same idea as " express trust " in English law In view of this ruling the decision of Gentle, J, in *Palaniappa Chettiar* v *Nachiappa Chettiar*,[4] which was based on English decisions and the view expressed in *Krishtappa Chetti* v *Lakshmi Ammal*,[3] cannot be considered to be good law The learned Judge there held that a deposit made by the father of a girl of moneys given to her as stridhanam with his natural born son who had been adopted into a stranger family and was carrying on business as a banker, constituted the depositee as " express trustee " of the money and that section 10 applied to a suit for its recovery.

It was next argued that Article 120 of the Limitation Act applied to the case, and the fraudulent adjustment of 1913 having been discovered by the plaintiff only in 1938, the suit brought in April 1939 within six years of such discovery was well within time It is now settled by the decision of the Privy Council in *O RM O M S P (firm)* v. *Nagappa Chettiar*[5], that a suit to recover trust property from a person who has taken it with notice of the trust by a transaction with the trustee which was a breach of trust on his part and with notice that it was a breach of trust is governed by article 120 of the Limitation Act, and time begins to run from the date when the plaintiff had knowledge of the transaction The Court below has apparently accepted the plaintiff's evidence that he became aware of the adjustment in Somasundara's accounts only after the termination of the claim proceeding instituted by his mother in the insolvency Court This finding was attacked before us It was pointed out that the plaintiff's grandfather and father, the second defendant, must have been parties to the transaction, and the plaintiff must have become aware of it even before his mother instituted the claim proceed-

1. L R. (1914) A C 399
2 (1943) 2 M L J 339
3 (1923) 44 M L J 431,
4 (1941) 2 M L J 558
5 (1941) 1 M L J 393 L R 67 I A. 448: I L R. 1941 Mad 175 (P.C)

ing in the insolvency Court in March 1932, and that reference to the transaction must have been deliberately omitted in that proceeding because it would have placed Muthiah Chetti, who conducted it on behalf of the plaintiff's mother and was her principal witness, in a difficult position. Our attention was drawn to the statement in the Official Receiver's order dated 26th Spetember, 1932, rejecting the mother's claim, wherein he stated that her vakil had the entire accounts examined in his office, and stress was laid also in this connection on the non-examination of Muthiah Chetti in the present suit While appreciating the force of this argument, we are not prepared to differ from the learned Subordinate Judge on a point which turns largely on the oral testimony of the plaintiff and his father, in the absence of any positive evidence to show that the plaintiff knew of the transaction more than six years before he brought the suit We accordingly hold that if the plaintiff's claim is otherwise well-founded, it is not barred by limitation

In the result, we allow the appeal and dismiss the suit, so far as the appellant is concerned, with costs here and in the Court below. The respondent will pay the Court fee due to the Government Provision will also be made for the inclusion of the costs of A S No 294 of 1941

B V V — *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR JUSTICE LAKSHMANA RAO

M K Thiagaraja Bhagavathar and others — *Appellants** *(Accused)*

Criminal Procedure Code (V of 1898), section 411-A (1) (b)—Appeal from verdict of jury at High Court Sessions on matter involving a question of fact—Powers of Court—Limits—Interference with verdict—Principles—Verdict of guilty on the uncorroborated and retracted evidence of approver—Legality—Interference with on appeal—When justified

In an appeal under section 411-A (1) (*b*) of the Code of Criminal Procedure on a matter involving a question of fact the Court has power to set aside the verdict of the jury if on a consideration of the facts and all the circumstances of the case, it is convinced that the verdict is unreasonable The omission in the Code of Criminal Procedure of a provision corresponding to sub section (1) of section 4 of the English Criminal Appeal Act (1907) does not affect the powers of an Indian High Court when hearing an appeal under section 411-A (1) (*b*) either by way of extending or limiting them

Section 133 of the Evidence Act states that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice Under the English Common law the same rule applies, but both in England and in India it has become a rule of practice and it is now virtually a rule of law, that corroboration is required But all that is necessary is that the Judge should warn the jury of the danger of convicting if the only evidence is that of an accomplice

Where the jury had been properly directed and there was material on which their decision could with reason be based the Court of appeal will not interfere with the verdict

The fact that the trial Judge agreed with the majority verdict of the jury is a matter which the appellate Court is entitled to take into consideration when considering the reasonableness of those findings

Appeals against the judgment of the High Court, Crown Side, dated 3rd May, 1945, and passed in Case No 3 of Second Criminal Sessions of 1945

Rao Bahadur V T Rangaswami Aiyangar, V V Srinivasa Aiyangar, K Kalyanasundaram, R Santanam, M Srinivasagopalan, V V Radhakrishnan, C Ramanna, B T. Sundararajan, S Krishnamurthi, K A Thanikachalam, V C Gopalarathnam, P Ramanathan and *M Santosh* for Appellants

The Advocate-General (*K Rajah Ayyar*), the Crown Prosecutor (*P. Govinda Menon*), *C D Venkataramanan* and *N Viraraghavan* for the Crown.

The Judgment of the Court was delivered by

The Chief Justice—On 8th November, 1944, one C N. Lakshmikanthan was stabbed while riding in a rickshaw in General Collins Road, Madras He received three wounds and died as the result in the Madras General Hospital in the early

* Crl. Ap Nos. 366, 376, 377, 395 and 396 of 1945 — 29th October, 1945

hours of the next day. Eight persons were charged with being concerned in the murder and were committed for trial at the High Court Sessions in April of this year All the accused were charged with being parties to a conspiracy to murder Lakshmikanthan The first and second accused were also charged with having committed the murder The third, fourth, fifth, sixth, seventh and eighth accused were charged with abetment as well as with conspiracy During the trial a *nolle prosequi* was entered in respect of the fifth accused and thereupon he was discharged The Jury unanimously found the first and second accused guilty on the conspiracy charge and of having committed the murder By a majority of 6 to 3 they found the third and fourth accused guilty on the conspiracy charge and of having abetted the murder They unanimously found the sixth and seventh accused guilty on the conspiracy charge and of abetment. By a majority of 6 to 3 they acquitted the eighth accused The learned Judge (*Mockett, J*) accepted the majority verdicts He sentenced the first, second, third, fourth, sixth and seventh accused to transportation for life and acquitted the eighth accused

By an order dated 12th July, 1945, this Court allowed the third and fourth accused to appeal on facts as well as on law under section 411-A (1) (*b*) of the Code of Criminal Procedure It refused leave to the other accused to appeal on facts, but they have all appealed under Clause (*a*) of the sub-section

We will deal with the appeal of the third and fourth accused first and then with the appeals of the first, second, sixth and seventh accused in that order The appeal of the third and fourth accused being on facts as well as on law, it is necessary to discuss and decide what are the powers of the appellate Court in appeals under section 411-A (1) (*b*) of the Code of Criminal Procedure Before the passing of the Criminal Procedure Amendment Act of 1943, there was no appeal from a verdict of a jury at High Court Sessions on facts It is unnecessary to quote the whole section, it is sufficient for the purposes of this case to quote sub-sections (1) and (2) They read as follows

"(1) Without prejudice to the provisions of section 449, any person convicted on a trial held by a High Court in the exercise of its original criminal jurisdiction may, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, appeal to the High Court—

(*a*) against the conviction on any ground of appeal which involves a matter of law only,

(*b*) with the leave of the appellate Court, or upon a certificate of the Judge who tried the case that it is a fit case for appeal, against the conviction on any ground of appeal which involves a matter of fact only, or a matter of mixed law and fact, or any other ground which appears to the appellate Court to be a sufficient ground of appeal, and

(*c*) with the leave of the appellate Court, against the sentence passed unless the sentence is one fixed by law

(2) Notwithstanding anything contained in section 417, the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, and such appeal may, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, but subject to the restrictions imposed by clause (*b*) and clause (*c*) of sub-section (1) of this section on an appeal against a conviction, lie on a matter of fact as well as a matter of law"

Clauses (*a*), (*b*), and (*c*) of sub-section (1) follow clauses (*a*), (*b*) and (*c*) of section 3 of the English Act, Criminal Appeal Act, 1907 Section 4 of the English Act provides

"(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal,

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred

(2) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered

(3) On an appeal against sentence the Court of Criminal Appeal shall if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other

sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed and in any other case dismiss the appeal."

There is no provision in the Code of Criminal Procedure corresponding to sub-section (1) of section 4 of the English Act, but we do not consider that the omission affects the powers of an Indian High Court when hearing an appeal under section 411-A (1) (*b*), either by way of extending or limiting them It is however relevant to point out that section 423 of the Code permits the appellate Court to alter the finding or direct a re-trial It cannot, however, in an appeal under section 411-A enhance the sentence.

In *Rex* v. *Baskerville*,[1] the Court of Criminal Appeal (*Lord Reading, C J, Scrutton, Avory, Rowlatt and Atkin, JJ.*) laid down the principles which governed the Court in deciding an appeal from the verdict of a jury on the facts In that case one of the questions was whether there had been corroboration in a material particular of the evidence of two accomplices In *Rex* v *Everest*[2], the Court had said

"The rule has long been established that the Judge should tell the Jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused "

The learned Judges who decided *Rex* v. *Baskerville*[1] said that the words "tell the Jury to acquit" should read "Warn the jury of the danger of convicting " In delivering the judgment of the Court in that case, *Lord Reading* said

"If after the proper caution by the Judge, the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated It can but rarely happen that the jury would convict in such circumstances In considering whether or not the conviction should stand, this Court will review all the facts of the case and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony But this Court, in the exercise of its powers, will quash a conviction even when the Judge has given to the jury warning or advice above mentioned if this Court, after considering all the circumstances of the case, thinks the verdict unreasonable, or that it cannot be supported having regard to the evidence "

In a later case, In re *Elizabeth Perfect*,[3] the Court of Criminal Appeal had to decide an appeal where the judge considered the verdict of the jury to be wrong and had given a certificate permitting the appeal It was not alleged that there had been any misdirection to the jury, that any evidence was wrongly admitted or that there was no evidence on which the jury could convict. There, Lord Reading said

"The questions in issue at the trial were purely questions of fact, and were, therefore, for the determination of the jury, and not for that of the Judge Unless we, sitting in this Court, are prepared to say that, when a Judge differs from a jury on a finding of fact, we ought to conclude that the verdict is unreasonable, or that there has been a miscarriage of justice, we cannot quash this conviction Substantially, the only evidence given was that of the prosecutor and that of the appellant It was for the jury to say which they believed, and to decide accordingly, bearing in mind that a doubtful case must result in a verdict of acquittal In these circumstances, it seems to us that we must accept the decision of the jury on the facts, and that we are not in a position to quash this conviction, unless we substitute ourselves as a tribunal of fact when we do not have, as had the jury, the opportunity of hearing and seeing the witnesses Therefore, this appeal must be dismissed "

In *Sheo Swarup* v *King Emperor*,[4] the Privy Council discussed the functions of a High Court in an appeal under section 417 of the Code of Criminal Procedure on an order of acquittal made by a Sessions Judge sitting without a jury, but with assessors. It was pointed out that sections 417, 418 and 423 of the Code give the High Court full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence, the order of acquittal should be reversed The judgment of the Board was delivered by *Lord Russell of Killowen*, who observed

"But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of

1 (1916) 2 K.B. 659.
2 2 Cr Ap R 130
3 12 Cr Ap R 273
4 (1934) 67 M L J 664 L R 61 I A 398 I.L.R 56 All 645 (P C)

seeing the witnesses To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice "

The same considerations must apply in an appeal under section 411-A (1) (*b*) on a matter involving a question of fact We hold that in an appeal under that clause, the Court has power to set aside the verdict of the jury if on a consideration of the facts and all the circumstances of the case, it is convinced that the verdict is unreasonable

Before passing on to the consideration of the facts in this case, we will state the position when the chief witness for the prosecution is an approver Section 133 of the Indian Evidence Act states that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice Under the English Common Law, the same rule applies but both in England and in India it has become a rule of practice, and, to use the language of the Privy Council in *Mahadeo* v. *The King*,[1] it is now virtually a rule of law, that corroboration is required. It is also an accepted rule that one accomplice cannot corroborate another , but section 30 of the Indian Evidence Act says that when more persons than one are being tried jointly for the same offence, and a confession made by one affecting himself and some of the others is proved, the Court may " take into consideration " the confession as against the others as well as against the person who makes the confession There is no corresponding provision in English Law In the recent case of In re *Rajagopal*,[2] a Full Bench of this Court had to consider the effect of this section and it accepted as correct the interpretation to be found in *Woodroffe and Ameer Ali's* Law of Evidence (Ninth edition, at page 312).

"These words (the words "take into consideration ") do not mean that the confession is to have the force of sworn testimony But such a confession is nevertheless evidence in the sense that it is a matter which the Court, before whom it is made, may take into consideration in order to determine whether the issue of guilt is proved or not The wording, however, of this section (which is an exception) shows that such a confession is merely to be an element in the consideration of all the facts of the case , while allowing it to be so considered, it does not do away with the necessity of other evidence "

In the present case there is evidene of a confession of one of the accused implicating himself and other accused. The learned judge in answer to a question put to him by the jury said that they should bear in mind the warning that an accomplice cannot corroborate an accomplice and that they should not attach much value to a statement by a co-accused.

In *Mirza Akbar* v. *The King Emperor*,[3] the Privy Council held that the common intention in section 10 of the Indian Evidence Act signifies a common intention existing at the time when the thing was said. done or written by one of the conspirators. Any statement or confession made by one conspirator to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is not admissible against another. In that case Their Lordships had not to consider the effect of section 30 of the Indian Evidence Act.

We now come to the facts which have general application. Lakshmikanthan was a person of bad character. In 1932 he was convicted of forging an affidavit and sentenced to undergo imprisonment for a period of seven years. He was released from prison in 1939. In 1943 he edited a weekly publication called " The Cinema Thoothu " but it ceased publication in January, 1944 On the 22nd July, 1944, he became the editor of another weekly paper called "The Hindu Nesan " which he continued to edit until his death. He professed to have a mission in life to protect the chastity of Indian womanhood, but his profession was merely a cloak for the writing of most scurrilous articles attacking the characters of prominent persons, especially persons well known in the cinema world. Among the persons he attacked were the third and fourth accused, both of whom were cinema actors and prominent in their profession. The articles which he had written against

1 (1936) 44 L W 253 (P C).
2 I L R. 1944 Mad 308 (F.B.).
3 (1940) 2 M.L J. 811 L R 67 I.A 336 : (1940) I.L.R. 21 Lah. 612 (P.C.)

these accused were put in evidence at the trial They accuse them of seduction of innocent girls and the wife of the fourth accused of being a prostitute Week after week he returned to the attack, and in the same scurrilous manner In the early part of 1944 the third and fourth accused along with other persons, who had been the victims of Lakshmikanthan's defamatory pen presented a petition to His Excellency the Governor praying that action should be taken against Lakshmikanthan It is the case for the prosecution that these attacks provided the motive for the third and fourth accused entering into a conspiracy to murder Lakshmikanthan It is said for the defence that there were equally scurrilous articles against many other prominent persons and that there was equally strong ground for suspecting that the murder might have been instigated by others This may be the case, but the grossly defamatory articles written by Lakshmikanthan may very properly be taken into account when considering why the third and fourth accused should take part in the conspiracy

On 19th October, 1944, Lakshmikanthan was assaulted and stabbed in the neck in Venkatachala Mudali Street, Madras The injury inflicted was not of a serious nature and had nothing to do with his death He alleged that his assailant was the first accused and he wanted the police to prosecute him The police, however, could not take up the case as it was non-cognizable The result was that Lakshmikanthan decided to file a complaint to the Magistrate against the first accused In this connection he consulted Mr J Nargunam, an advocate of this Court on the night of 7th November, 1944 Mr Nargunam drafted the complaint and gave it to Lakshmikanthan to have it typed About 9 A M on 8th November, Lakshmikanthan arrived at Mr Nargunam's house with the typed complaint He left Mr Nargunam's house at about 10 A M in a rickshaw, taking the complaint with him He was attacked and fatally stabbed a few minutes later in General Collins Road The scene of the attack was some 130 yards from Mr Nargunam's house

On the 11th December, 1944, the police arrested Jayanandam who became the approver We shall refer to him as such hereafter The approver was in custody at the Egmore police station from 11th to 14th December On the 15th December, he was taken before the Fifth Presidency Magistrate as he had intimated that he wished to make a confession When he appeared before the Magistrate he refused to make any statement That afternoon he was taken to the Penitentiary where he remained until the afternoon of the 16th December On that day he was again placed in the custody of the investigating police officer and detained in the Egmore police station. Rule 86 (3) of the Criminal Rules of Practice states that an accused, who has been produced before a Magistrate for the purpose of making a confession and who has declined to make it or has made a statement which, from the point of view of the prosecution is unsatisfactory, shall not be remanded to police custody If he is remanded to other custody, the investigating police officers shall not, except in the presence of the Magistrate, be allowed either to see him again or to have any further communication with him The order of the Commissioner of Police of the 16th December, directing the approver to be detained at the Egmore police station was improper, but there is no reason to believe that it was passed otherwise than by oversight and we consider that the approver's subsequent confession was not the result of such detention.

On the afternoon of the 17th December, the approver was taken to the Saidapet sub-jail and thereafter he was never in police custody. That evening he wrote a letter to the Commissioner of Police in which he stated that he was going to talk to the Presidency Magistrate touching matters relating to the murder case of Lakshmikanthan and praying that he might be sent to the Magistrate He explained that his failure to make a statement when sent before the Fifth Presidency Magistrate on the 15th December, was the result of threats made by Nagalingam (the second accused) and his relatives. On the 19th December, he wrote out in his own hand a petition to the Chief Presidency Magistrate in which he intimated that he wished to make a confession. In this petition he set out statements of fact

which agree with the statements of fact which he subsequently made in his confession The confession was made on the 22nd December, and duly recorded under section 164 of the Code of Criminal Procedure by the Sub-Divisional Magistrate of Saidapet. It may be summarised as follows :

He and his sister had been attacked by Lakshmikanthan in an issue of " The Hindu Nesan " On the 7th November, 1944, the second accused came to him and told him that arrangements had been made to do away with Lakshmikanthan Thereupon he asked the second accused how he could perform such a dangerous and big feat The second accused replied that the third and fourth accused would supply any amount of money and also defend them if they were caught He then persuaded the approver to follow him to the People's Park where the rest of " the gang " were waiting They went by tram to the Moore Market where they met the seventh, first, and sixth accused and two others There the second accused showed the first accused to the approver and said that he was the first assailant of Lakshmikanthan and that he was prepared to kill him the next day The sixth accused asked the approver whether the second accused had told him all about the plot and he said that he had The sixth accused explained that they were on a dangerous expedition and that if by any chance anyone was caught, he should not show up his friends, " even if torn from limb to limb Kamalanathan (P W 25) who was there was introduced as the person who was going to finance the " whole show " The eighth accused was also introduced to him. Kamalanathan said that they should go and meet the " big persons " and fix up the whole of the affair They were taken to the Wall Tax Road " Ottavadai Theatre " and asked to stop outside Kamalanathan went inside and asked them to come in one by one when he made signs Fifteen minutes later Kamalanathan returned with a man who had side whiskers and asked them to go in. The eighth accused stopped outside at a place where the tram turned The first accused waited on a platform in front of a coffee hotel The approver, Kamalanathan, the sixth accused, the second accused, and the seventh accused were taken to the make-up room in the theatre The third and fourth accused then came into the room The third accused said that doing away with Lakshmikanthan was a very tough job, and he wanted to know whether they could do the job thoroughly The second and seventh accused said that they would see the thing through without missing it. The third accused then impressed upon them the necessity for extreme secrecy and caution and said that if they gave up their names they would be disgraced for life The third accused said that he would pay them Rs 2,500 as promised as soon as the work was completed and that if the job was done thoroughly he would give further presents

He further said that if by any chance they were detected he and his friends would give them all the help possible At the instigation of the third and fourth accused they took an oath that even if they lost their heads they would not expose the third and fourth accused The fourth accused gave to the sixth accused Rs 500 and promised the remaining Rs 2,000 " after completing the job." They took the money to the People's Park where the first and eighth accused joined them. The sixth accused gave him (the approver) Rs 50 and asked him to meet him the next morning At about 4-45 A M , on the next day the second accused came to his house and woke him up He and the second accused went together to Perambur Barracks Road and at a tea shop there they met the seventh, sixth and eighth accused The seventh accused told him that they need not be frightened and that the second and first accused would be doing the work and all that they had to do was to be there and help them if necessary The eighth accused went away to watch the house of Lakshmikanthan They sat in the tea shop At about 9 A M , the eighth accused came running and asked them to get ready The sixth accused called them and they all went outside and the eighth accused showed them Lakshmikanthan going in a rickshaw The first accused said that the place was not suited for the purpose and asked them to wait for Lakshmikanthan's return They followed the rickshaw and stopped near the tram-road The sixth accused went into the Y. M. C. A building close by. Lakshmikanthan went

into the house of his lawyer, Mr Nargunam, who was living in the next street. He (the approver) was asked to stand along with the seventh and second accused in the street next to that in which the lawyer lived. He remained there talking to the people who were milking cows in a shed close by The first and second accused went and stood on the other side of the house. A little later the rickshaw came out of the Vakil's house The first and second accused followed the rickshaw He and the seventh accused stopped near the shed A little later the second accused came running and signed to him to run away The seventh accused also asked him to clear out and he ran away to his house The next day he learned that the first accused had been arrested In his confession the approver, of course, referred to the various accused persons by name. In the foregoing summary we have for the sake of brevity omitted the names and have referred to them by their designations at the trial A pardon was tendered to the approver and accepted by him He gave evidence in the committal Court on the 22nd February, 1945, and his testimony there was in accordance with the statements which he had made in his confessional statement He was called as a witness in the Sessions Court, on the 9th April, 1945, when he retracted his confession and said that he had made it as a result of having been tortured by the police Thereupon the approver's deposition in the committal Court was treated as evidence in the case by reason of the provisions of section 288 of the Code of Criminal Procedure

On the 9th November, A K Ramanna (P. W. 26) wrote a letter to a friend named V S Mani Aiyar (P W 28) who was then at Salem. In this letter he stated that at about 10-30 A M the previous day, Lakshmikanthan had been stabbed and that he died at 4 A M , the next day. The letter also contained this statement ·

> "Yesterday morning at 11 o'clock   came to me and informed me that he had done away with the life of C. N L and warning me not to publish this news went away."

The letter was opened by the censor who on the 11th November sent a photographic copy of it to the police as it contained a clue to the murder of Lakshmikanthan. The letter was re-posted and delivered to the addressee on the 14th November The police had arranged that Inspector K. V Venkatasubramaniam (P. W 29) should be present when the letter was delivered. At the time of delivery the addressee was asked, who was the writer The letter had not been signed by Ramanna, but merely bore the initials " A K R " at the place of signature. V. S. Mani Iyer said the writer was Ramanna whose address he gave The Inspector telephoned to Madras and Ramanna was traced and questioned that night He admitted it was his letter In his evidence at the Sessions Court he said that the person whose name was left blank was the sixth accused. It may be mentioned that Ramanna was living as a paying guest in the house of V. S. Mani Iyer in Madras.

In his evidence Ramanna also stated that at about 4-30 or 5 P.M , on the 8th November, the sixth accused came to him and said " Give me your hand" His face at that time was frightful to look at The sixth accused told him: " I have done away with Lakshmikanthan " and when asked who did it he said · " Two of my insignificant fellows did it " He further said : " Thiagarajan, N. S. Krishnan and Sriramulu all of us joined together and had done this If ultimately, however, the case comes to light, they should use their influence and go up to the Viceroy and get the case dismissed " Thiagarajan is the third accused. N S. Krishnan the fourth accused and Sriramulu the fifth accused. He also said, " I have just now seen Bhagavathar and Sriramulu Naidu and I have come here." Bhagavathar is the third accused.

Ramanna stated that he knew the third accused well. He had known him from 1936 and the fourth accused since 1943.

Kamalanathan was examined as the twenty-fifth witness for the prosecution and admitted that he had been at the Wall Tax Theatre on the evening of the 7th November, and that he had met there the approver, the second, third, fourth, sixth and seventh accused, but he professed that he only went there to induce the third accused to transfer to Madras a newspaper which he was publishing in Trichinopoly and to give him employment in connection with it.

In his summing up, the learned Judge more than amply warned the jury of the danger of accepting the approver's evidence and he indicated that Kamalanathan should be treated as an accomplice whose testimony could not be used to corroborate the approver. He also warned them that when taking into consideration the confession of the sixth accused to the witness, Ramanna, under section 30 of the Evidence Act, an accomplice could not corroborate another accomplice. We have been taken through the relevant portions of the learned judge's summing up and the third and fourth accused can have no complaint about his fairness. The same observation also applies to the summing-up as far as the other accused are concerned.

It has been suggested that there was a mis-direction on the defence of *alibi* set up by the fourth accused. This defence was only raised in the Sessions Court although in the committal Court the fourth accused did say that he was in Salem at the time. The learned Judge told the jury that in his opinion it was regrettable that this was not disclosed before and quoted to them a passage from the judgment of Lord Alverstone, C. J., in *Rex* v. *George William McNair*,[1] where the learned Chief Justice said that if a person charged with an offence were ill-advised enough to say he would reserve his defence, and to keep back what he alleged to be the true story so that it could not be investigated before the trial, the fact that his story as told at the trial was not believed by the jury was not a ground for interfering with the verdict. The sooner an innocent man told the truth, the better it was for him. We can see no just cause for complaint here.

In criticising the summing up in this connection the learned counsel for the appellant relied on the decision of the Court of Criminal Appeal in *Rex* v. *Naylor*[2], where a prisoner before his committal for trial, was cautioned in the words prescribed by the Criminal Justice Act, 1925, section 12, sub-section (2), namely, "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial." In reply, the prisoner, said. "I do not wish to say anything, except that I am innocent." At the trial at quarter sessions, the Recorder commented on the failure of the prisoner to make a more complete statement and said to the jury: "Surely, if he is innocent, one would think he would make his defence then and there." It was held that this was a mis-direction because the true intention of the caution was to convey to an accused person the information that he was not obliged to say anything unless he desired to do so. That case has no application here. As we have said, we do not regard the learned Judge's comment as amounting to a mis-direction and moreover he left the question to the jury quite open.

Now what had the jury before them on which to base their verdict in respect of the third and fourth accused? In the first place there was the deposition of the approver treated as evidence under section 288 of the Code of Criminal Procedure which they were entitled to accept if they were convinced that the statements made in it were true. The statements in it accord with what he said in his petition to the Chief Presidency Magistrate and with his confession to the Sub-Divisional Magistrate. Of course, the approver could not corroborate himself, but the fact that he was consistent in what he said in those lengthy statements is noteworthy. That he retracted his confession and repudiated his evidence in the Committal Court is not of great importance. The jury saw him in the witness box and were in a position to form an opinion whether he was then speaking the truth.

The prosecution had shown a motive for the third and fourth accused taking part in the conspiracy and agreeing to pay the assassins and have them defended should they be caught. Certainly the third and fourth accused must have been very embittered against Lakshmikanthan. Then there was the confession of the sixth accused to the witness Ramanna which the jury were entitled to take into consideration.

1. 25 T L R 228.

2. 1933 1 K.B 685.

In these circumstances can it be said that the verdict of the majority of the jury in respect of the third and fourth accused was unreasonable? We consider that the answer must be in the negative They had been properly directed and there was material on which their decision could with reason be based It follows that the appeal of the third and fourth accused must be dismissed.

The approver's evidence against the first accused is corroborated by Gopal, the puller of the rickshaw in which Lakshmikanthan was stabbed. This witness identified the first and second accused as the assailants On behalf of the first accused it was said that the pardon was illegal, that the approver's statement should not have been admitted in evidence under section 288 of the Code of Criminal Procedure and that the approver had been induced to confess

Section 337 of the Code of Criminal Procedure says that in the case of an offence triable exclusively by the High Court or Court of Session and certain other offences the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or a Magistrate of the First Class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of a person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to him on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence Section 339 provides that where a pardon has been tendered and the Public Prosecutor certifies that in his opinion, a person who has accepted the tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, may be tried for the offence in respect of which the pardon was tendered or for any other offence of which he appears to have been guilty in connection with the same matter.

As we have already said, the confession was recorded by the Sub-Divisional Magistrate, Saidapet, on the 22nd December, 1944 On the 2nd January, 1945, the approver was taken, before the Chief Presidency Magistrate who asked him whether he had made a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every person concerned, whether as principal or as abettor in the commission of the offence, to the Sub-Divisional Magistrate, and his answer was "Yes" To the question whether that statement was voluntarily made and whether he understood the consequences, he again replied "Yes". He was asked whether he was prepared to stand by that statement in the Court at the trial of the case He said that he was He was then asked "Are you aware that you are liable for prosecution for the offence (of conspiracy to murder and murder) if you resile from the statements you made to the Sub-Divisional Magistrate, Saidapet?" Again he answered "Yes" It is suggested that the answer to the last question implied that he was granted the pardon on the condition that he did not resile from his confession We consider that this argument is entirely unsustainable The Chief Presidency Magistrate had merely warned him of the action that might be taken against him under section 339 if he gave false evidence.

There is equally no substance in the suggestion that the approver's deposition was unlawfully accepted in evidence It was admitted in evidence under section 288 Criminal Procedure Code and the section certainly permits of the admission.

The suggestion that the approver was induced to make the confession is based on the concluding sentences of his petition to the Chief Presidency Magistrate, on the 19th December, 1944, where he said.

"I did not tell the Court because Nagalingam threatened me previously that if we told the truth before the Court myself and the rest must go to the gallows This is truth I request I may be examined and saved This is truth"

The suggestion is that he made the confession because he understood that by doing so he would go free. The answer to this is provided by the answer to the last question put by the Chief Presidency Magistrate before tendering the pardon "Are you aware that the tender of pardon is no bar to your being prosecuted for

the offences ?" The answer was again " Yes". It may be pointed out that when the approver retracted his confession at the trial he made no suggestion that inducement had been held out to him but alleged maltreatment by the police. The case now set up is quite inconsistent with the approver's own case and is obviously a mere after-thought.

Counsel for the first accused also contended that the learned Judge had misdirected the jury on two points The first objection has reference to the evidence of Dr Joseph of the Madras General Hospital The accident register relating to the admission of Lakshmikanthan on the morning of the 8th November, 1944, contains this statement " Alleged to have been caused by a bichuwa at 10 A.M on the 8th November, 1944, on the road near Chengalvaraya Naicker's estate turning of Presentation Convent. Name, not known". The prosecution suggested that the words " Name, not known" had been inserted afterwards, but Dr Joseph's evidence was to the effect that the entries in the register were all made at the same time. In his summing up the learned Judge said:

> "You remember that the prosecution refused to call Dr Joseph The position is quite clear and we have the great advantage of the Judicial Committee laying it down that there is no necessity on the prosecution to call a witness they do not think is telling the truth You have merely got, gentlemen, to look at the "name, not known" entry You remember, gentlemen, I insisted he should be before the Court and because the prosecution does not call him, it does not follow that he is not speaking the truth."

This certainly did not indicate that Dr Joseph was unworthy of credence and again the matter was left for the jury to decide

The second complaint is that the learned Judge did not explain to the jury the difference between murder and culpable homicide not amounting to murder. There was no reason for the learned Judge to enter into any discussion of what was meant by culpable homicide not amounting to murder Lakshmikanthan had clearly been murdered and no one had suggested that the crime was culpable homicide not amounting to murder The learned Judge told the jury that the offence was either murder or grievous hurt If they were satisfied that Lakshmikanthan died as the result of the stabbing it was unnecessary for him to tell them that that was murder, and there was no doubt about it. The appeal of the first accused is dismissed.

There was even more corroborative evidence against the second accused. Three witnesses Muniswami Naidu, (P. W. 21) Madanagopal Naidu, (P W 22) and Chittibabu, (P. W 23), milkmen carrying on business in the vicinity of the scene of crime, all speak to having seen the second accused in the neighbourhood on the morning of the crime. Muniswami Naidu stated that the second accused spoke to him shortly before Lakshmikanthan was stabbed Madanagopal and Chittibabu deposed that they saw three people running away and both of them identified the second accused as one of them Madanagopal Naidu also identified the other two as being the seventh accused and the approver In addition to recognising the second accused Chittibabu recognised the approver

It has been suggested on behalf of the second accused that the learned Judge misdirected the jury with regard to Lakshmikanthan's knowledge of the second accused and that there were further misdirections in that he did not point out to them that there was no evidence of motive so far as the second accused was concerned and that he did not mention that the second accused was only identified 34 days after the crime.

The question of Lakshmikanthan's knowledge of the second accused is not a matter of importance, but in any event we consider there was no misdirection. What the jury had to consider was whether they could believe the evidence that the second accused had actually taken part in the stabbing and they were convinced that the evidence was sufficient for the purpose It was not necessary for the prosecution to prove motive on the part of the second accused The case against him was that he was a hired assassin. With regard to the third point learned counsel said that the learned Judge stated that the first accused was identified within 48

hours but he did not emphasise that it was 34 days after the crime that the second accused was identified. The evidence is that the second accused was arrested on the date of his identification the 12th December, 1944. The Jury accepted the evidence of identification. The appeal of the second accused is dismissed

In the case of the sixth accused there is the evidence of the approver, Ramanna and Muthukrishna Nayudu (P W 20) The evidence of the last-mentioned witness has not yet been referred to. He is the proprietor of a cycle shop in the neighbourhood of the scene of crime He was acquainted with the first, sixth and seventh accused. He had known the first accused for a year, the seventh accused for two years and the sixth accused for ten or fifteen years On the morning of the 8th November, 1944, he saw the first accused and three others turning into Kelly's Road from the Purasawalkam High Road Just opposite to the Purasawalkam market there is a Hindu military hotel which is two or three furlongs away from the scene of the murder. The witness said that he saw the sixth and seventh accused standing opposite this hotel and were there joined by there first accused. This was about 7-45 or 8 A.M. He went into the hotel himself for meal and was inside for ten minutes. He heard that day that Lakshmikantan was stabbed.

In this case it is said that the learned Judge misdirected the jury because he did not conform to section 297, Criminal Procedure Code, he did not address the jury on the absence of motive and he did not mention in his summing up that Ramanna was inimically disposed towards the sixth accused and had himself been in police custody for three days Section 297 provides that in cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

We have already referred to the careful manner in which the learned Judge summed up and it is idle to say that he disregarded the provisions of this section. In this case as in the case of the second accused no motive was suggested. The case rested on direct evidence against the accused and the jury believed that evidence There is no evidence at all to support the suggestion that Ramanna bore enmity against the sixth accused The suggestion that the learned Judge shou'd have told the jury that Ramanna had been detained by the police for examination must also be rejected. The fact that he had been detained and examined by the police could not necessarily mean that his evidence was open to suspicion The police had to examine him because of the letter which he had written to V S Mani Iyer in Salem Nothing was found against him and he was released from detention. The appeal of the sixth accused is dismissed.

The case against the seventh accused rests on the evidence of the approver, Muthukrishna Nayudu, the cycle shop-keeper, and Madanagopal Navudu, the milkman The evidence of Madanagopal Nayudu and Muthukrishna Nayudu provides important corroboration of the evidence of the approver against the seventh accused All that counsel can say here is that the learned Judge had not put forward his client's case sufficiently strongly in his favour. This is what the learned Judge said ·

> "Madanagopal identifies accused 2 and 7, Chittibabu, accused 2 and the approver but not accused 7 That is very important They did not both identify accused 7 So if they had been got at, why should they both not identify accused 7 ? It is a matter for you to consider "

In view of this it cannot be said with reason that the case of the seventh accused was not put strongly enough. His appeal is dismissed.

We may add that in accepting the majority verdicts of the jury the learned Judge showed that he agreed with their findings and this is a matter which this Court is also entitled to take into account when considering the reasonableness of those findings We may further add that at the end of his summing up the learned Judge paid the following tribute to the jury for the manner in which they had followed the case .

> "In about five minutes I propose to release you for your duty of deciding the facts of this case I have not said much about it before although counsel have But I cannot possibly refrain from paying a tribute to you, whatever the result of your decision , that does not matter I cannot picture any jury could possibly have given greater and more conscientious attention to this case than you.

I do not know whether your questions have been counted, but I have quite a sheaf of them They are all here and they will be attached to the record Time and time again you have asked questions That is of very great comfort to me and to counsel because it shows that a serious case of this sort is not being treated in a light-hearted manner but with all the seriousness it deserves As I said, when this case is over you will not regret the immense trouble you have taken over this "

There can be no doubt that all the accused had a very fair trial The convictions and sentences are confirmed.

K.S. ——— *Convictions and sentences confirmed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SHAHABUDDIN

Pattiam Veettil Monokki Sankaram Nambiar .. *Petitioner**

v

Kottayam Bank by its Official Liquidator, Tellicherry and others *Respondents*

Companies Act (VII of 1913), sections 235 and 198—Proceedings against a director of a company under section 235—Cannot be continued against his heirs after his death during the proceedings

A proceeding under section 235 of the Companies Act against a director of a company cannot be continued against his heirs after his death during the proceedings

There is nothing in section 198 of the Act to indicate that the powers of the Court with regard to the estate of a contributory or a debtor can be exercised in a summary proceeding under section 235 of the Act

Official Liquidators, Mufassil Bank v *Jugal Kishore,* I.L R (1939) All 6 and *Manilal Brijlal* v *Rao Sahib Vandrawandoss,* I L R (1944) Bom 284, followed

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, North Malabar at Tellicherry dated 18th January, 1945, in I. A No. 493 of 1944 in O P. No 31 of 1940.

S. Venkatachala Sastri for Petitioner

P. Govinda Menon for Respondents.

The Court delivered the following

JUDGMENT —The point for determination in this Civil Revision Petition is whether proceedings started against a director of a company under section 235 of the Indian Companies Act can be continued after his death by bringing his legal representatives on record.

The petitioner started proceedings under section 235 against the directors of a company in liquidation one of whom, Krishnan Nambudiri, died before the enquiry was over The petitioner then filed the application out of which this civil revision petition arises to bring the respondents on record as the heirs of Krishnan Nambudiri This application was opposed on the ground that it could not be continued after the death of the deceased director The learned District Judge of Tellicherry relying on the decision of the Allahabad High Court in *Official Liquidators, Mufassil Bank* v *Jugal Kishore,*[1] accepted this contention and dismissed the petitioner's application.

In *Official Liquidators, Mufassil Bank* v. *Jugal Kishore,*[1] it was held that proceedings under section 235 of the Companies Act against a director cannot after the death of the director during the proceedings be continued against his heirs as representing his estate. The Bombay High Court in *Manilal Brijlal* v. *Rao Sahib Vandrawandoss,*[2] a decision cited on behalf of the respondents has taken the same view. It held that it was never intended to involve the Court on an application under section 235, in an enquiry relating to the estate of a deceased person The learned advocate for the petitioner does not refer to any decision in his favour ; but he relies on section 198 of the Companies Act and the provisions of the Code of Civil Procedure with regard to the bringing on record of the legal representatives. His argument is this Under section 198 of the Companies Act the Court has the

* C R P No 317 of 1945 13th July, 1945.

1. I.L.R. (1939) All. 6. 2. I.L R. (1944) Bom. 284

power to institute proceedings against the estate of a contributory or a debtor of a company. This power can therefore be exercised by the Court in proceedings under section 235. Under section 141 of the Code of Civil Procedure provisions relating to the bringing on record of legal representatives are applicable to cases arising under the Indian Companies Act Having regard to these two provisions the application of the present petitioners should have been allowed.

I am unable to accept these contentions. Section 198 of the Companies Act deals with the powers of the Court with regard to the estate of a contributory or a debtor but there is nothing in that section to indicate that these powers can be exercised in a summary proceeding under section 235 As regards the provision in the Code of Civil Procedure reference is made to Order 22, rule 4 of the Code of Civil Procedure, but this provision applies only if the right to sue survives. The question whether the right to continue a proceeding under section 235 of the Companies Act, survives has to be determined on the language of that section. This, the learned Judges have fully considered in the above mentioned decisions, and having regard to the langua e of section 235 I respectfully agree with their view that a proceeding under that section cannot be continued against the heirs of a deceased director. I therefore see no reason to interfere. The petition is dismissed with costs.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR JUSTICE SHAHABUDDIN

Neelam Suryanarayanamurti Naidu (minor) and others .. *Petitioners**

v.

Boggavarapu Satyanarayanamurti and others *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), *section* 19-*A* (4) (a) *and* (b) *and* (8)—*Order on application under S* 19-*A—Appealability*—Ex parte *proceedings—Refusal to set aside—Appeal—Maintainability —Civil Procedure Code* (*V of* 1908), *Order* 9, *rule* 13 *and Order* 43, *rule* 1 (*d*)

Where the Judge found that the debtors were not agriculturists entitled to the benefits of the Madras Agriculturists' Relief Act but without dismissing the petition on that ground he went on to say that the creditor was entitled to whatever amount was payable under the mortgage,

Held, that the order should be deemed to be one under section 19-A (4) (*b*) of the Act and that it was not appealable

Although section 19 A (8) of the Act may make the provisions of Order 9 rule 13 of the Civil Procedure Code applicable to proceedings under the Act, it cannot attract the right of appeal conferred under Order 43, rule 1 (*d*) of the Civil Procedure Code Hence an order refusing to set aside an *ex parte* order in such proceedings is not appealable

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Cocanada, dated 3rd July, 1944, in O. P No 63 of 1943, etc.

C R. P No 1374 of 1945.

B. V. Subramanyam for Petitioner. *P Somasundaram* for Respondent.

C R P No 1374 (A) of 1945.

K Kameswara Rao for Petitioner *P Somasuudaram* for Respondent

A. A. O No 691 of 1944

B V Subramanyam for Appellant *P Somasundaram* and *K. Kameswara Rao* for Respondent.

A A O No 221 of 1945

K Kameswara Rao for Appellant *P Somasundaram* for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—These connected appeals arise out of an application made by the respondent-creditior under section 19-A of the Madras Agriculturists

* C. R. P. Nos 1374 and 1374-A of 1945 and
A. A. O. Nos. 691 of 1944 and 221 of 1945 5th November, 1945.

Relief Act He alleged that the debtors, who are five in number, were not agriculturists entitled to the benefits of the Act ; but prayed that if for any reason they were found to be agriculturists within the meaning of the Act, the Court should ascertain the sum properly payable under the mortgage executed in his favour. In support of his case that the debtors were not agriculturists, he filed certain certificates (Exs. P-3 to P-7), granted by the Commissioner, Coconada Municipality, which, he claimed, showed that the respondents who were said to be undivided were assessed during 1935-1937 to house and land tax in respect of properties whose annual rental value exceeded Rs 600 so as to bring them within the mischief of proviso (C) to section 3 (ii) of the Act. The debtors pleaded that they were divided and that if their individual shares in the properties were alone taken into account as they should be, the proportion of the annual rental value attributable to each of such shares would be well below the statutory limit of Rs 600

The petition was adjourned from time to time and was posted finally to 3rd July 1944. On that day it would appear that two of the debtors, respondents 1 and 2 in the lower Court, who appeared by a separate pleader were ready ; but neither respondents 4 to 6 or their vakil appeared and the hearing was adjourned till 2 p m. on that day to enable them to appear. Finding, however, that none of the respondents or vakils appeared when the case was called the learned Judge set all the respondents *ex parte* and pronounced judgment holding, on the strength of the certificates filed by the creditor, that the debtors were not agriculturists entitled to the benefits of the Act and that the creditor was entitled to the amount due under the mortgage bond. From this order the debtors have preferred C M A. No 690 of 1944 On the next day the debtors applied by separate petitions for setting aside the *ex parte* order and rehearing the original petition. The learned Judge dismissed these petitions holding that the grounds put forward for the non-appearance of the debtors and their pleaders were unconvincing and that their laches could not be condoned. Against these orders C.M.A No 691 of 1944 and 221 of 1945 have been preferred

Mr. Somasundaram appearing for the respondent-creditor has raised a preliminary objection that all these appeals are incompetent and should be dismissed as such The learned counsel has argued that the order of the Court below on the main petition should be regarded as an order made under section 19-A (4) (*b*) of the Act and as such is not appealable under the provisions of section 25-A, as sub-section (*i*) of Clause (*c*) of that section provides for an appeal only from orders made under cluse (*a*) of sub-section (4) of section 19-A. As regards the other two appeals, Mr Somasundaram has urged that they are also not maintainable, as, although section 19-A (8) may make the provisions of Order 9, rule 13 of the Civil Procedure Code applicable to proceedings under the Act, it cannot also attract the right of appeal conferred under order 43 rule 1 (*d*) of the Civil Procedure Code. We are of opinion that both the preliminary objections are well founded and must prevail.

As regards the objection urged in connection with C M A. No. 690 of 1944, the debtors have submitted that the order must really be deemed to have been made under section 19-A (4) (*a*) as it does not purport to " dismiss " the application, as an order under clause (*b*) of that sub-section should, but, on the other hand, " doth order and direct that the petitioner be and the same hereby is entitled to the amount due under the mortgage bond dated 17th October, 1931 ". There is no substance in this argument. The learned Judge found that the debtors were not agriculturists entitled to the benefits of the Act Having come to that finding he should, no doubt, have proceeded to dismiss the petition ; but without doing so in terms he went on to say that the petitioner was entitled to the amount due under the mortgage -It is however quite clear from his order that the learned Judge does not purport to ascertain the amount that would be properly payable under the mortgage if it was liable to be scaled down under the Act, as he has held that the debtors were disqualified under proviso (*c*) (to section 3 (ii) of the Act) from claiming the benefit of the Act. The mere remark that the creditor was entitled to

whatever amount was payable under the mortgage is not such a declaration as is contemplated under clause (*a*) of section 19-A (4). If the order is regarded as one made under clause (*b*) of sub-section (4) as we think it must be, then the question whether an appeal lies in respect of such an order is concluded by the decision in *Mahaboob Ali* v *Khudratulla*,[1] where it is pointed out that no right of appeal is given when an application for a declaration is dismissed on the ground that the debtor is not an agriculturist or the debt is not one which can be scaled down under the Act.

Turning to the preliminary objection raised in respect of the other two appeals, it is contended for the debtors that section 141 of the Civil Procedure Code which provides that the procedure provided in the Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction attracts the application of Order 43, rule 1 to proceedings under section 1 -A. We fail to appreciate this argument Before the amending Act of 1943, section 141 was no doubt held to make the provisions of Order 9 applicable to proceedings under the rules framed under Act IV of 1938 Sub-section (*i*) of section 19-A of the amended Act however now makes provision for the application of the procedure provided in the Code to proceedings under section 19-A and it is no longer necessary to invoke section 141 for the purpose. It is also difficult to see how either section 141 (of the Civil Procedure Code) or sub-section (8) of section 19-A which only makes the procedural provisions of the Code applicable to proceedings under the Act can also attract the substantive right of appeal conferred under Order 43, rule 1 (*d*) It has been repeatedly pointed out that a right of appeal is a creature of statute, and is not in the nature of things. The provisions relating to rights of appeal under the Act are contained in section 25-A and they confer no right of appeal against orders of the kind here in question. Furthermore, as we have held that the main case is not open to appeal, even Order 43, rule 1 (*d*) would be of no avail to the appellants These appeals, therefore, must also fail.

It is, however, urged for the debtors that there are sufficient grounds for interference by this Court in revision and that C M A No. 690 of 1944 should be treated as a revision petition, on payment of the requisite Court-fee. We are inclined to accept this suggestion. The certificates of assessment filed by the creditor show that persons who are not shown to be in any way connected with any of the debtors were also assessed in respect of the properties in question. For instance, Ex. P-3 refers to Neelam Sri Ramamurthi, Tirupathirayudu and Venkataratnamma as having been assessed to property tax in the relevant period on properties of the aggregate rental value varying from Rs 1,180 to Rs. 1,189 Tirupathirayadu is said to be the father of respondents 4 and 5. But who the other two persons are and what shares they possessed in the properties assessed is not known, for the petitioner has adduced no oral evidence on the point. The position is the same as regards the other certificates, except Ex. P-5 in which two of the debtors appear to have been assessed It has been held by this Court that when once a person is shown to have a saleable interest in any agricultural land the burden of proving that he is disqualified under one or other of the four provisos to section 3 (*ii*) lies upon the creditor. Here, the debtors would undoubtedly be agriculturists unless they come within the mischief of one or other of the provisos, because the mortgage in question includes agricultural land. The burden, therefore, of showing that the debtors were disqualified from claiming the benefits of the Act lay upon the creditor, and, as already stated, he has adduced no evidence to show what shares the debtors had in the properties assessed in the names of the three individuals referred to above and whether their proportionate annual rental value exceeded Rs. 600.

In these circumstances there is no material on record to show that the debtors come within the mischief of proviso (*C*) which the creditor has invoked. It would appear from the order of the l arned Judge that he did not seriously apply his mind

1. (1943) 2 M.L.J. 630.

to the decision of the case, but, finding that the debtors and their pleaders did not appear when the petition was taken up, he simply assumed that the certificates filed by the creditor were sufficient to bring the debtors within the proviso (C) We are of opinion that in thus disposing of the matter he acted with material irregularity in the exercise of jurisdiction.

We therefore allow C M A. No 690 of 1944 and the memorandum of objections filed therein to be converted into civil revision petitions on payment of the additional court-fees by the parties concerned, and direct that the matter be then sent back to the lower Court for disposal after a fresh hearing at which both parties will be given an opportunity to produce their evidence Having regard to all the circumstances of the case, we make no order as to costs. The other two appeals, C. M. A. Nos. 691 of 1944 and 221 of 1945 will be dismissed with costs.

B.V.V. ——— *C. M A. No. 690 of 1944 & the memorandum of objections converted into revision petitions and allowed. Rest dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Gonjalada Bhojarajappa .. *Appellant**

v.

Korlahalli Halappa and others .. *Respondents.*

Agriculturists' Loans Act (XII of 1884), section 5—Scope—Power of Collector to recover loan by sale of any immoveable property of defaulter—Sale without service of notice on mortgagee of property—Validity—Suit disputing sale—Limitation

For the recovery of a loan advanced under the Agriculturists' Loans Act it is open to the Collector to sell any part of the immoveable property belonging to the defaulter, and the remedy is not confined to that particular property in respect of which or for whose improvement the loan had been taken

For the sale of the property of a defaulter it is not essential that notices should be served on persons holding a mortgage over the defaulter's property A sale will not be illegal and a nullity merely by reason of the non-service of any notice on the mortgagee of the property

A suit disputing the legality of such a sale must, according to section 59 of the Revenue Recovery Act which applies, be filed within six months from the date on which the cause of action arose

Appeal against the decree of the District Court of Bellary in Appeal Suit No. 59 of 1943 preferred against the decree of the Court of the District Munsiff of Hospet in O S. No. 696 of 1941.

Kasturi Sehagiri Rao for Appellant

K. Umamaheswaram and *A Viswanatha Aiyar* for Respondents.

The Court delivered the following

JUDGMENT —This appeal has to be dismissed on two short points The learned District Judge found that the first loan, the land improvement loan, was fully discharged and had been closed before the sale of S No. 320 which took place on the 8th February, 1934. He was of the view that this land was wrongly sold for the balance of the agricultural loan which was still outstanding He took that view apparently because he was of the opinion that it was only the land which constituted security for the loan that could be sold for the realization thereof That view does not seem on an examination of the provisions of the Agriculturists' Loans Act to be correct Under section 5 of that Act every loan made under that statute could be recovered from the person to whom the loan was made as if it was an arrear of land revenue ; and the procedure for realizing arrears of revenue is laid down in the Revenue Recovery Act. Section 5 of that Act provides that whenever revenue may be in arrear, it shall be lawful for the Collector, or other officer empowered by the Collector in that behalf, to proceed to recover the arrear, together with interest and costs of process by the sale of the defaulter's moveable and immoveable property, or by execution against the person of the defaulter in the manner provided. Thus it is clear that for the recovery of a loan advanced under the Agriculturists' Loans Act it is open to the Collector to sell any part of the

* S. A. No. 2371 of 1944. 11th December, 1945.

immoveable property belonging to the defaulter, and the remedy is not confined to that particular property in respect of which or for whose improvement the loan had been taken It is contended on behalf of the appellant that the sale is altogether null and void as no notices were served as prescribed in the Revenue Recovery Act upon him, the mortgagee I do not find any warrant for the claim that for the sale of property belonging to a defaulter notices should be served on persons holding a mortgage over his property. In the present case I am satisfied that notices were served on the person who owned S No 320 at the time, and consequently there is no illegality in effecting the sale by reason of non-service of notice on the mortgagee or for any other reason

In view of this finding the ground upon which the learned District Judge proceeded to dismiss the appeal, namely the bar arising under section 59 of the Revenue Recovery Act comes into play. Under that section a suit disputing the legality of a revenue sale has to be instituted within six months from the date on which the cause of action arose Admittedly in this case the suit was filed after the expiry of the prescribed period. Consequently the suit on that ground also becomes not maintainable

The appeal is dismissed with costs of the sixth respondent.

Leave refused.

K.S. *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO

C. K. S. Krishnamurthi and another *Appellants**

v.

Chidambaram Chettiar and others *Respondents*

Hindu Law—Joint family—Decree against father as manager—Minor son cannot sue to set aside on the ground of gross negligence of the father in the suit

Where a Hindu father sues as the manager of a joint family the junior members of that family are bound by the decree in the suit The principle that a minor can sue to set aside a decree passed against him on the ground of the gross negligence on the part of his guardian only applies to a suit which concerns property held by the minor in his own right and in which a decree is passed against the minor and cannot be extended to cover the case of a decree against a father as manager of the joint family in respect of family property

Egappa v *Ramanathan*, (1942) 1 M.L J 155, I.L R (1942) Mad 526 distinguished

Appeal against the decree of the Court of the Subordinate Judge of Madura, dated 17th April, 1944, and passed in O.S. No. 60 of 1942.

G. R. Jagadisa Aiyar for Appellants.

The Advocate-General (*K Rajah Aiyar*) and *K. Srinivasan* for Respondents

The Judgment of the Court was delivered by

The Chief Justice.—The appellants are the plaintiffs in the suit They are the sons of the 10th defendant. They seek to set aside the decree of this Court in Appeal No. 250 of 1937 in so far as it affects the interest claimed by them in the properties mentioned in the plaint. Appeal No. 250 of 1937 arose out of O. S. No. 1 of 1936, which was filed by the plaintiffs' father in the Court of the Subordinate Judge of Madura to recover possession of the land in suit The Subordinate Judge held that he had failed to prove title to the land. On the other hand he found that the respondent in that appeal had established a title and he had also shown that he had been in adverse possession for more than the statutory period before the 10th defendant purported to purchase the property. On appeal this Court considered that it was not necessary to go into the question of the 10th defendant's title because it was obvious that the respondent had already acquired a title by adverse possession.

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* Appeal No 490 of 1944. 22nd November, 1945.

The plaintiffs in the present suit alleged that their father was grossly negligent in the conduct of O S No 1 of 1936 and that the present case falls within the principle discussed in *Egappa* v. *Ramanathan*[1], where this Court accepted as *stare decisis* the earlier decisions of this Court and other High Courts to the effect that in India a minor can sue to set aside a decree passed against him in a suit not only on the ground of fraud or collusion, but also on the ground of gross negligence on the part of his guardian in the suit

The learned Subordinate Judge did not consider it necessary to inquire whether there had been gross negligence on the part of the plaintiffs' father in the conduct of O S. No 1 of 1936 He held that in that suit the father had sued as the manager of the joint family and that the junior members of that family were bound by the decree With this decision we are in entire agreement.

The principle referred to in *Egappa* v. *Ramanathan*[1] cannot be applied to a case like the present one. The principle only applies to a suit which concerns property held by the minor in his own right and in which a decree is passed against the minor. The principle should certainly not be extended to cover a case like the present one Here the father, as the manager of the family, represented all the co-parceners and he sued on the basis that the property belonged to the family. If the appellants' contention were accepted, it would mean that any coparcener, whether he be an adult or a minor, could sue to set aside a decree lawfully passed on the ground of the manager's negligence.

The appeal is dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

K. Chunilal Sowcar . *Petitioner**

v.

K. N Srinivasa Rao and another *Respondents.*

Provincial Insolvency Act (V of 1920), *sections* 9 *and* 19 (1)—*Madras High Court Rules, rule* 21 (3)—*Application by creditor—Notices sent to creditors and insolvent—Order of adjudication—Intervening amendment of rule* 21 (3)—*Notice prescribed for transferee also—Amendment if retrospective*

The petitioning creditor filed an insolvency petition under section 9 of the Provincial Insolvency Act on 10th December, 1943 In accordance with the High Court Rule 21 made under section 79 of the Act notices of the date fixed for hearing of the petition under section 19 (1) were sent to all the creditors and to the debtor within the prescribed time The date fixed for the hearing of the petition was 9th February, 1944, but for some reason or another the actual hearing was postponed until 24th March, 1944, when an order of adjudication was passed In the meantime, on 29th February, 1944, an amendment to rule 21, sub-rule (3), had been made, making rule 21 (3) read to the effect that notices of the date fixed for the hearing of an insolvency petition must be served not only on the creditors and the debtor but also on any transferee, the transfer in whose favour is alleged to be an act of insolvency. The order on the petition having been made in the absence of the alienee he preferred an application in the appeal preferred by the insolvent for being added as a party The District Judge held that he was not only entitled to notice but that he was entitled to contest the petition and in that view remanded the petition to the lower Court for fresh disposal.

Held, in revision, that the amendment to rule 21 (3) was not retrospective and that the order of the lower Court remanding the petition for fresh disposal was incorrect and should be set aside

In the matter of the petition of *Ratansi Kalianji and others*, (1877) I L R 2 Bom 148 at 206, *Gopeshwar Pal* v *Tibanchandra Chandra*, (1914) I L R 41 Cal 1125 at 1141 and *Janakinath Singha Roy* v *Nirodbaran Ray*, (1929) I L R 57 Cal 148 at 152, referred to

Petition under section 75 (1) of Act V of 1920 praying that the High Court will be pleased to revise the order of remand dated 20th July, 1945, and made in C.M A No 33/of 1944 on the file of the Disrict Court of Chingleput (I.P. No. 7 of 1943, Sub-Court, Chingleput).

K. Sankara Sastri for Petitioner.

K. M Venkatavaradachari, T. C. A. Bashyam and *T. C. A. Thirumalachari* for Respondents.

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1. (1942) 1 M L J. 155 I.L.R (1942) Mad. 526.

* C. R. P. No. 921 of 1945. 21st November, 1945.

The Court delivered the following

JUDGMENT:—This Civil Revision Petition purports to be filed under section 75 of the Provincial Insolvency Act against an order of the District Court on appeal from the order of the Subordinate Judge of Chingleput made in insolvency petition No. 7 of 1943.

The petitioning creditor is the petitioner here. He filed an insolvency petition under section 9 on 10th December, 1943. In accordance with the High Court Rule made under section 79 of the Act with regard to notices (Rule 21), notices of the date fixed for the hearing of the petition under section 19 (1) of the Act were sent to all creditors and to the debtor within the time laid down by rule 21 (3). The date fixed for the hearing of the petition was 9th February, 1944. For some reason or another the actual hearing was apparently postponed until the 24th March, 1944, when an order of adjudication was passed. In the meantime, on 29th February, 1944, an amendment to rule 21, sub-rule 3 had been made making rule 21 (3) read to the effect that notices of the date fixed for the hearing of an insolvency petition must be served not only on the creditors and the debtor but also on any transferee, the transfer in whose favour is alleged to be an act of insolvency within the meaning of clauses (*a*), (*b*) or (*c*) of section 6 of the Act.

The order of adjudication was therefore made in the absence of the alienee and without any notice of the date of hearing having been given to him. The insolvent had appealed against the adjudication order to the District Court. In that Court, the alienee, the present respondent, filed a petition to be added as a party to the appeal on the srength of the above amendment to the rules. The learned District Judge held that he was entitled not only to notice but also to come on record and to contest the petition before the lower Court. He felt that the proper course was to set aside the order of the insolvency Court and to remand the petition for fresh disposal on hearing whatever contentions the newly added alienee desired to put forward. He made an order accordingly.

The petitioner now says that this order was made without jurisdiction in that the amendment to the rule is not retrospective in the sense in which it was understood by the learned District Judge.

The principles are, I think, reasonably well settled. With regard to the retrospective operation of statutes, the general principle is that they are not retrospective unless the intention of the Legislature that they should be so construed is expressed in plain and unambiguous language "because it manifestly shocks one's sense of justice that an act legal at the time of doing it, should be made unlawful by some new enactment". See Maxwell on the "Interpretation of Statutes" 8th edition, page 5. With regard, however, to alterations in procedure, somewhat different principles apply. As is said in *Janakinath Singha Roy* v. *Nirodbaran Ray*[1]:

"No person has any vested interest in procedure and it is well settled that matters of procedure apply to a pending suit if the law is changed during the pendency of the suit."

In *Gopeshwar Pal* v. *Jibanchandra Chandra*[2], it is stated by a Full Bench:

"The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot (in our opinion) govern suits where such compliance was from the first impossible. The effect is to regulate not to confiscate."

The general principle, I think, is that the statutes and rules are not to be considered retrospectively so as to deprive any person of a vested right. In *In the matter of the petition of Ratansi Kalianji and others*[3], there is a reference to the words of Lord Wensleydale in *Attorney-General* v. *Sillem*[4], where he said:

"The right of the suitor is to bring the action and to have it conducted in the way and according to the practice of the Court in which he brings it, and if any Act of Parliament, or any rule founded on the authority of the Act of Parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode. That, therefore, takes away nothing. The right of action does not constitute a title to keep all the consequences of the right as they were before. It gives a right to have the action conducted according to the rules then in force with respect to procedure."

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1. (1929) I.L.R. 57 Cal. 148 at p. 152.
2. (1914) I.L.R. 41 Cal. 1125 at 1141.
3. (1877) I.L.R. 2 Bom. 148 at 206.
4. (1864) 10 H.L. 704: 11 E.R. 1200.

And then again at page 207 there is a reference to the view of Wilde, B, in another case there referred to where he says

"The right of the suitor is to bring an action and have it conducted according to the practice of the Court Pending the action the procedure may be varied, but his right is to have his action conducted according to the existing course of procedure, whatever that may be"

and then the Bombay Bench says that the learned Baron

"is evidently referring to proceedings to be taken after the statute introducing change of procedure comes into operation, and there is nothing in his judgment to indicate that he considered that the effect of a proceeding already had and concluded would be altered by a statute annexing greater or less effect to a similar proceeding taken subsequently to the statute"

With regard to the alterations in procedure, Maxwell concedes at page 199 as follows

"The general principle, however, seems to be that alterations in procedure are retrospective, unless there be some good reason against it",

and again at page 200 he says

"A new procedure would be presumably inapplicable, where its application would prejudice rights established under the old."

On the facts of this case, the petitioner filed his petition in full accordance with the rules prevailing in December, 1943, and he gave the requisite notices to those persons to whom notices had to be given, of the date fixed for hearing, namely, 9th February, 1944 The matter was then out of his hands He could do no more under the existing rules If the petition had been heard on 9th February, 1944, no question of course would arise at all Does the fact that the rule as to notices was amended between the date fixed for hearing and the date of the actual hearing render it necessary or just that the petition, as the District Judge has ordered, should be reopened and that the petitioner, who did all that he was required to do, should be compelled once more to give notices of some new date fixed for hearing and incur all the consequent expense and trouble ?

In my opinion the amended rule was not retrospective in that sense and the learned Judge's order remanding the matter for rehearing was incorrect and is set aside. The appeal of the insolvent will be disposed of in the usual course according to law The petition is allowed with costs

B.V.V ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE SOMAYYA

Rajah K. J. V. Naidu .. *Petitioner* *

Court-Fees Act (*VII of* 1870), *section* 7 (iv) (e)—*Scope—Suit for declaration of plaintiffs' customary rights to graze cattle, cut wood, etc, free of charges from forest belonging to defendant with a prayer for injunction—Relief not one "with reference to any immoveable property" within the meaning of Madras Amendment to section* 7 (iv) (c) *of the Court-fees Act—Proper valuation for jurisdiction and Court-fee*

In a suit for a declaration that the plaintiffs have certain customary and mamool rights [*inter alia*—to graze cattle, to take leaves for manure, to cut and take wood required for fuel and other building and domestic purposes and for agricultural implements and to take grass for roofing—all free of charges] in a forest area belonging to the defendant with a prayer also for injunction, the plaint was valued at Rs 100 under section 7, clause (*iv*) (*e*) of the Court-fees Act It was contended on behalf of the defendant that the case came directly under clause (*iv*) (*c*) of section 7 as amended in Madras and that the suit was with reference to an immoveable property and as such must be valued at half of the full value of the land for purposes of Court-fee and jurisdiction Negativing that contention,

Held, as easements do not involve possession of land, house or gardens, the Madras Amendment to section 7, clause (*iv*) (*c*) does not apply to the case which must be confined to cases where title to or possession of immoveable property is involved Accordingly the case comes under section 7, clause (*iv*) (*e*) of the Court-Fees Act, and the plaint was properly valued

Gurunatha Chettiar v *Secretary of State*, (1935) 70 M L J 625 I L R 59 Mad. 962, followed, *Venkatakrishna Pattar*, In re, (1926) 52 M L J 121, discussed and *Sri Rajah Nayani Venkataranga Rao Bahadur* v *Sri Raja Tadakamalla Sitaramachandra Rao Bahadur*, (1940) 2 M.L J 655 · I L.R (1941) Mad 157, distinguished

* C. R. P. No. 1336 of 1945 14th November, 1945.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Tirupattur, dated 31st July, 1945, in O S No 198 of 1943.

V. T. Rangaswami Aiyangar and *K Kalyanasundaram* for Petitioner.

The Court delivered the following

JUDGMENT.—The question raised in this civil revision petition is that the suit is beyond the pecuniary jurisdiction of the District Munsiff's Court, Tirupattur The suit is one for a declaration that the plaintiffs have certain customary and mamool rights—*inter alia*—to graze cattle, to take leaves for manure, to cut and take wood required for fuel and other building and domestic purposes and for agricultural implements and to take grass for roofing—all free of charges—in a forest area belonging to the second defendant who is the petitioner in this Court There is also a prayer for injunction. The plaint was valued at Rs. 100 under section 7, clause (*iv*) (*e*), of the Court-fees Act Objection was taken in the written statement that the correct value of the suit was above Rs. 3,000 and that the trial Court has no pecuniary jurisdiction to try the suit. The lower Court found in favour of the plaintiffs and held that the suit was properly valued and the second defendant has filed this revision petition Mr V T. Rangaswami Aiyangar, the learned advocate for the petitioner, urges that this case comes directly under clause (*iv*) (*c*) of section 7, which runs thus :

"Suit to obtain a declaratory decree or order, where consequential relief is prayed "

The Madras Amendment is that in a suit coming under sub-clause (*c*), in cases where the relief sought is with reference to any immoveable property, such valuation shall not be less than half the value of the immoveable property calculated in the manner provided for by paragraph (*v*) of the section It is said that the suit is with reference to an immoveable property and that therefore the Madras amendment applied to this case Reliance is placed upon the decision of Jackson, J , in *Venkatakrishna Pattar*, In re,[1] and the observations of Wadsworth, J., in *Sri Rajah Nayani Venkataranga Rao Bahadur* v *Sri Rajah Tadakamalla Sitaramachandra Rao Bahadur* [2] In the case before Jackson, J , the lower Court directed the plaintiff to pay court-fees under section 7, clause (*iv*) (*c*) as amended in Madras The plaintiffs acquiesced in the validity of that order and paid the court-fee as directed by the District Munsiff The defendant brought up the matter in revision and urged that the suit should have been valued under section 7, clause (*v*) (*e*) as one for the possession of the paramba and the buildings thereon The only point that was decided by Jackson, J , was that section 7, clause (*v*) did not apply There was no question raised before the learned Judge about the correctness of the decision of the trial Court that the suit should be valued under section 7, clause (*iv*) (*c*), as amended by the Madras Act. The decision is only an authority for the proposition that in such cases section 7, clause (*v*), is not applicable. In fact, the learned Judge says thus :

"In the present suit the question of title is not raised at all , it is only a question of easement and the difficulty is to decide how far the Madras proviso is applicable to such cases Inasmuch as the relief sought is the declaration of a right of easement, the relief may be said to be with reference to immoveable property , but it refers to no immoveable property that can be possessed as contemplated by section 7, clause (*v*) It almost seems that the proviso should be read with the clause so as to make 'with reference to' mean involving the possession of land, houses or gardens , and then the proviso would not be applicable to easements at all "

Thus Jackson, J , was inclined to take the view that the expression "with reference to" means "involving the possession of land." So, unless the relief asked involved the possession of land, the Madras proviso would not apply and as easements do not involve possession of land, house or gardens, the proviso does not apply to easements at all The position is clarified by Varadachariar, J , in *Gurunatha Chettiar* v. *The Secretary of State*,[3] where the learned Judge points out that the expression "with reference to" occurring in the Madras amendment really involves the idea that it must have reference to a question of title to immoveable property. The learned Judge says thus :

1. (1926) 52 M L J 121.
2. (1940) 2 M.L.J. 655 : I.L.R. (1941) Mad. 962.
3. (1935) 70 M.L J 625 I L.R 59 Mad.

"The amendment provides for a case where 'the relief sought is with reference to any immoveable property' It seems to me that the *prima facie* interpretation of that expression is that the dispute should in some sense relate to the title to immoveable property This is obviously Jackson, J 's opinion in In re *Venkatakrishna Pattar* 1 The learned Judge points the difficulties and anomalies to which any other construction will lead It is true that in that case the lower Court had asked the plaintiff to pay Court-fee on the basis of the Madras Amendment to section 7, clause (*iv*) (*c*). But there was no complaint against it by the plaintiff, and the learned Judge had only to deal with the defendant's contention that the suit must be valued as one for possession"

In the case before Wadsworth, J , reported in *Sri Rajah Nayani Venkataranga Rao Bahadur* v. *Sri Rajah Tadakamalla Sitaramachandra Rao Bahadur*,[2] the point did not arise for consideration The only decision on the point is that of Varadachariar, J., in *Gurunatha Chettiar* v *Secretary of State*,[3] and, in my opinion, that is the correct view to take. It is preposterous to say that where a plaintiff wants a right of passage across his neighbour's land the plaintiff should be called upon to pay Court-fee on half of the full value of the neighbour's land There are other difficulties in the way of accepting the petitioner's argument Obviously such cases come under section 7, clause (*iv*) (*e*) and that result is achieved by confining the Madras Amendment to cases where title to or possession of immoveable property is involved. This revision petition is dismissed

K S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SHAHABUDDIN

Neni Kavur Bai by Agent Jalamchand Lodha *Appellant**

v

P Ranganatham Pillai and another *Respondents.*

Transfer of Property Act (IV of 1882), section 55 (1) (g) and Contract Act (IX of 1872), section 69—Covenant against existence of encumbrances, proceedings in Court, attachment or otherwise—Agreement to indemnify vendee against any such claims—Property attached before judgment in suit against one of the vendors prior to the sale—Vendee paying off the attaching creditor to prevent the sale—Right to reimbursement—Insolvency of that particular vendor, if affects such right

A certain property was sold on 16th January, 1940, and the vendors covenanted that the property sold was free from any charge, lien or other encumbrance except the mortgages specifically mentioned whose discharge was the consideration for the sale, and that it was not subject to any proceeding of Courts, decree, attachment or otherwise In a suit filed against one of the vendors, an order for attachment before judgment was obtained on 19th April, 1939, and on a decree being passed, the vendee paid off the creditor to prevent the property being sold Subsequently in 1941 that vendor was adjudicated an insolvent In a suit by the vendee to recover the amount paid by him to ward off the sale,

Held, that under the covenant and under section 55 (1) (*g*) of the Transfer of Property Act and section 69 of the Contract Act the vendee was entitled to be reimbursed for the full amount paid to the attaching creditor and not merely for the insolvent's share in the equity of redemption

(1943) 2 M L J 356, reversed

On appeal from the decree and judgment of the Hon'ble Mr. Justice Bell† dated the 23rd day of July, 1943, and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No 14 of 1943.

T V. Muthukrishna Aiyar, N. R Govindachari and *C. R Rajagopalachariar* for Appellant.

K. Narasimha Aiyar and *S Srinivasa Raghavan* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—On the 16th January, 1940, the first respondent and his brother P. Narayanaswami Pillai sold certain house property to the appellant for the sum of Rs 37,000 The consideration for the sale was the discharge of fourteen mortgages which had been created by the vendors, or one of them, for loans aggregating Rs. 28,745 and the balance in cash The vendors covenanted

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1 (1926) 52 M L J 121

2. (1940) 2 M.L J 655 I.L.R (1941) Mad. 157

3 (1935) 70 M L J 625 · I L R 59 Mad. 962.

* O. S. A. No. 47 of 1943. 30th March, 1944.

† (1943) 2 M.L.J. 356.

that the property sold was free from any charge, lien or other incumbrance except mortgages specified and that the property was not subject to any proceeding of Courts, decree, attachment, maintenance decree or otherwise They agreed to keep the purchaser indemnified against any such claims and to make good all loss, damage and expenses that the purchaser might suffer P Narayanaswami Pillai was adjudicated an insolvent on the 25th February, 1941. Before his adjudication a creditor had filed a suit to recover from him the sum of Rs 4,043-1-0, and, on the 19th April, 1939, obtained an attachment before judgment The creditor was granted a decree and in order to prevent the right, title and interest of P Narayanaswami Pillai being sold in execution the vendee had to pay off the creditor. The amount involved was Rs 5,375 As the elder brother did not reimburse the vendee, and as the insolvent was not in a position to do so, the vendee instituted the suit which has given rise to this appeal.

The action was tried by Bell, J ,[1] who found for the plaintiff in the sum of Rs. 1,720-9-0, for which he gave him a decree. The plaintiff says that the learned Judge entirely misunderstood the legal position and that under the covenant and under section 55 (1) (*g*) of the Transfer of Property Act and section 69 of the Contract Act he was entitled to a decree for the full amount claimed

We consider that this contention is well founded. In arriving at the figure of Rs. 1,720-9-0, the learned Judge estimated that this was the value of the younger brother's share in the equity of redemption and that this was what the plaintiff would have to pay if he had taken steps to raise the attachment This is mere speculation The learned Judge's arithmetic in arriving at the figure of Rs 1,720-9-0 is not even accepted, but it is not necessary to go into figures because the vendors are liable under their covenant and under the sections mentioned to reimburse the plaintiff for any amount due under a lawful attachment provided that he had paid it The plaintiff could not in law be required to enter into negotiations with the attaching creditor for a reduction of the amount, nor could he be compelled to wait until the property was put up for sale, even though he might have purchased it himself for a lesser sum The vendors had covenanted that the property was free from attachment and they undertook to pay whatever the vendee was required in law to pay to remove an attachment should one be found to exist. There was a lawful attachment in respect of the sum of Rs. 5,375 and this the plaintiff paid in order to free his title

The decree passed by the trial Court must be amended to provide for the payment of the sum of Rs. 5,375 with interest at the court rate from the date of suit to this date and thereafter on the decretal amount until payment or realisation The appellant is entitled to his costs here and below on this amount. They will be paid by the first respondent who has opposed the appeal. The plaintiff will, of course, be entitled to prove as against the second brother in the insolvency proceedings. The costs of the Official Assignee will come out of the estate

V.P S. *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KOMAN

V. Chidambaram Chettiar and another *Appellants**

v.

M. A. Meyyappan Ambalam and others *Respondents*

Stamp Act (II of 1899), section 34—Levy of penalty—Rule if applicable to copy of document—Destruction of unstamped original by mob's action—Admissibility of copy in evidence on payment of penalty—Deed releasing interest in immoveable property—Need for registration

In 1881, the landlord granted a cowle of certain forest lands to one *U* The plaintiffs' case was that it was granted to *U*, as representative of two families The plaintiffs, who alleged that they were members of one of the two families sued to establish their right to their share in the property. The defendants, who were purchasers of the

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1. (1943) 2 M.L J 356

* Appeal No. 342 of 1944. 12th November, 1945.

right from the other family, denied the plaintiffs' right Before the trial commenced the plaintiffs produced an unstamped document of the year 1902 and purporting to have been executed by *U* in favour of the head of the plaintiffs' family thereby relinquishing his right to a share in the leased property Before the trial commenced a mob invaded the Court house and set fire to it The result was that many records were destroyed including the suit records When the trial commenced the plaintiffs sought to put in a copy of the document of the year 1902 This was objected to on the ground that a copy could not be stamped even on the payment of the penalty, and also on the ground that the original document itself was inadmissible in evidence for want of registration

Held, that the document was rightly excluded from evidence Section 34 of the Stamp Act only relates to the stamping of original documents, and the fact that document filed in Court before the trial was destroyed by the mob's action will not put the plaintiffs in any better position

Raja of Bobbili v *Inuganti China Sitaramaswami Garu*, (1899) L R 26 I A 262 I L R 23 Mad 49 (P C) and *Rippiner* v *Wright*, (1819) 2 B & Ald 478 106 E R 440, relied on

Held, further, that the original document which purported to release an interest in immoveable property was inadmissible in evidence for want of registration.

Appeal against the judgment of the Court of the Subordinate Judge of Devakottai, dated 17th November, 1943 and made in O. S No. 98 of 1941.

T. V Muthukrishna Aiyar and *K S. Rajagopala Aiyangar* for Appellants.

B Sitarama Rao and *T Krishna Rao* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice—The question in this appeal is whether the Subordinate Judge rightly held a certain document to be inadmissible in evidence If this document is excluded, it is conceded that there is no substantial basis for challenging the decree under appeal.

On the 12th March, 1881, the Zamindar of Sivaganga granted to one Ulagappa Chettiar a permanent cowle of 100 kurukkams of forest land We are told that 100 kurukkams is roughly the equivalent of 57 acres. The plaintiffs' case is that the cowle was granted to Ulagappa Chettiar acting on behalf of the members of two Nattukottai Chettiar families, the P. M A. family of which the plaintiffs are members and the O A family of which the members are defendants 39 to 52. The plaintiffs alleged that the share of their family was three-eighths and the share of the O. A family five-eighths The members of the O. A family denied that the P M A family had any interest in the cowle. The first defendant purchased the cowle from the O A family and subsequently sold most of the lands to defendants 2 to 38 The learned Subordinate Judge held that the P. M. A family had no interest in the cowle. It had been granted to Ulagappa acting for the O A. family alone

Before the trial commenced the plaintiffs produced an unstamped document bearing the date 1st November, 1902, and purporting to have been executed by Ulagappa Chettiar in favour of the head of the P. M A family Before the trial commenced a mob invaded the Court house and set fire to it The result was that many records were destroyed, including the record in the present case When the trial commenced the plaintiffs sought to put in a copy of the document. This was objected to on the ground that a copy could not be stamped even on the payment of the penalty Moreover the original itself was inadmissible by reason of non-registration It was also averred that the document had been fabricated by the plaintiffs for the purposes of their case. The Subordinate Judge, without admitting the document but leaving the question of its admissibility open until he had heard the arguments of counsel at the conclusion of the case, marked it as Ex P-8 (*a*) It is clear from his judgment that in doing so it was not to be regarded as an exhibit in the case

The disputed document purported to be a copy of a deed under which Ulagappa Chettiar released all claim to 5-5/8 kurukkams of land to P M A family The 5-5/8 kurukkams were said to form part of 30 kurukkams of forest land of which the P. M A and the O. A families had purchased the kudivaram rights from certain Nattars on the 17th June, 1884. It was suggested by the plaintiffs that these 30 kurukkams formed part of the 100 kurukkams granted by the Sivaganga Zamindar to Ulagappa Chettiar on the 12th March, 1881. There is no evidence

that the 30 kurukkams did form part of the larger area and the probabilities are all against it, because the cowle of the 12th March, 1881, covered both the kudivaram and melvaram rights. In these circumstances there could be no need for the grantees of the cowle to purchase the kudivaram right in part of the land covered by it The plaintiffs wanted to put in a copy of the disputed document because they considered that it supported their claim with regard to a share in the land covered by the cowle This in itself is to be doubted ; but in any event it is quite clear that the disputed document cannot be admitted in evidence

Section 34 of the Stamp Act only relates to the stamping of original documents. See *Raja of Bobbili* v *Inuganti China Sitaramaswami Garu*[1] The fact that the document filed in Court before the trial began was destroyed by the mob's action puts the plaintiffs in no better position In *Rippiner* v *Wright*[2], it was held that where an agreement on unstamped paper had been destroyed, no parol evidence could be given of its contents, even if it had been destroyed by the wrongful act of the party who took the objection In that case an agreement had been reduced into writing on unstamped paper The plaintiff snatched it from the hands of the defendant's attorney and then destroyed it It was contended that the plaintiff, by his act in destroying the paper, had prevented the defendant from getting it stamped, as he might have done, on payment of the penalty and therefore it was not competent for him to take the objection with regard to its admissibility It was held that the evidence was properly rejected. It was the duty of the parties to an agreement to take care that when it was executed it was properly stamped ; and it was one of the risks attendant upon an omission to do this that if an accident happened to the document before the stamp was affixed, there was no remedy. It was not possible to say whether or not the Commissioners of Stamps, in the exercise of their discretion, would have permitted the agreement, if it had remained in existence, to be stamped on payment of the penalty.

It appears that the plaintiffs in this case did pay the penalty into Court, but this was done of their own volition without any decision on the question of admissibility The further objection that the original document was not admissible because it was not registered must also be accepted The document clearly purported to release interest in immoveable property and required registration.

We uphold the decision of the Subordinate Judge with regard to the inadmissibility of the document and as the learned counsel for the appellants has nothing further to urge, we must dismiss the appeal with costs in favour of the first respondent.

B.V.V. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SHAHABUDDIN.

Gudementla China Appalaraja .. *Petitioner**

v

Kota Venkatasubba Rao .. *Respondent.*

Civil Procedure Code (V of 1908), section 13 (b)—Foreign Court—Compromise decree—Decree in effect a recognition of arrangement already arrived at between parties—Decree whether on merits—If conclusive between parties

From the language of section 13 of the Civil Procedure Code and the observation of the Privy Council in *Keymer* v *Viswanatham Reddi*, (1916) 32 M L J 35 (P C), it would appear that for a decree of a foreign Court to be conclusive there should be a controversy and an adjudication thereon

The present petitioner and the respondent went to the *Yanam* Court in French territory with a drafted compromise, and the decree in question was passed on the strength of that compromise. On a question whether that decree can be regarded as a decision given on merits within the meaning of section 13, Civil Procedure Code,

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1. (1899) L.R. 26 I A 262 I.L.R. 23 Mad. 49 (P C.).
2. (1819) 2 B. & Ald. 478 : 106 E R. 440.

* C. R. P. No. 1197 of 1944. 24th August, 1945.

Held, that when the parties went to that Court they had no dispute and there was nothing for the Court to decide The decree given mechanically in accordance with a prescribed rule was in effect a mere recognition by the Court of an arrangement already arrived at between the parties, and in the circumstances, it could not be said that the decree of the *Yanam* Court was a decision on merits and as such was not conclusive between the parties

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Cocanada, dated 9th February, 1944, and passed in A S No 56 of 1943, preferred against the decree of the Court of the District Munsiff, Cocanada, in O. S No. 146 of 1942.

K. Bhimasankaram for Petitioner.

D Narasaraju for Respondent

The Court delivered the following

JUDGMENT —The petitioner was the defendant in O S No 146 of 1942, filed by the respondent in the Court of the District Munsiff of Cocanada. The case of the respondent was that the petitioner who is his brother-in-law, agreed to lend him Rs. 525 on security of his lands in Yanam which is in French territory Under the French Law, the immoveable properties in French territory can be made liable only under a decree obtained in French Courts. The petitioner and respondent therefore proceeded to Yanam and obtained a consent decree from the Sub-Court of Yanam to the effect that the respondent owed the petitioner a sum of Rs 525 and agreed to pay the same with interest at 8 per cent per annum within a period of two years But as a matter of fact the petitioner had by that time paid the respondent only Rs 100 and though he promised to pay the entire balance in Cocanada, he paid him only Rs 25. The respondent therefore claimed the balance with interest mainly as damages for breach of a contract and alternatively on the basis of specific performance of a contract to lend The petitioner contested this claim His case was that he had lent the respondent Rs 500 on a promissory note and that when he pressed for the repayment of this amount, the respondent agreed to suffer a decree in the French Court in Yanam and on their going to that Court a decree in the petitioner's favour was passed It was contended that in view of that decree, the claim of the respondent was barred under section 13, Civil Procedure Code Other contentions also were raised and although evidence had been adduced on all the issues, the learned District Munsiff without going into the merits dismissed the suit on a preliminary point regarding the effect of the decree of Yanam Court He held that the decree was conclusive in the matter relying on the decision in *Muhammad Moideen* v *Chinthamani Chettiar*[1]. On appeal the learned Subordinate Judge differed from the District Munsiff and considered that the above decision did not apply to the facts of the present case He therefore remanded the suit for disposal on merits It is against this order that this revision petition had been filed

The only point for determination in this petition is whether the decree passed by the Yanam Court can be regarded as a decision given on merits within the meaning of section 13 which is in these terms ·

"A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title "

One of the exceptions to this rule is clause (*b*) 'except where it has not been given on the merits of the case' In *Muhammad Moideen* v *Chinthamani Chettiar*[1], the decree of the foreign Court was based on a joint representation by the plaintiff and defendant that if they did not settle their dispute by a certain date the suit shall be decreed as prayed for It is argued that the present case is a similar one and as the respondent consented to the decree in question being passed, that decree should be considered as having been given on the merits of the case It is therefore contended that clause (*b*) of section 13 does not apply. On behalf of the respondent it is argued

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1. (1929) 56 M.L.J 547 · I.L.R. 52 Mad. 503

that for the application of section 13 it is necessary that there should be a controversy. Reference in this connection is made to the decision of the Privy Council in *Keymer* v *Viswanatham Reddi*[1]. The decision in *Muhammad Moideen* v. *Chinthamani Chettiar*[2] is distinguished on the ground that in that case there was a controversy unlike the present case.

I have been through these decisions and in my opinion the contention of the respondent has to prevail and this petition must be dismissed In *Keymer* v *Viswanatham Reddi*[1], the decree of the English Court had been passed *ex parte* on the defence having been struck off because the defendant did not answer the interrogatories. It was held that to that decree section 13 (*b*) applied. In that connection, their Lordships observed that that provision

"refers to those cases where for one reason or another the controversy raised in the action has not, in fact, been the subject of direct adjudication by the Court"

From this observation and the language of section 13 it would appear that for a decree of a foreign Court to be conclusive there should be a controversy and an adjudication thereon In *Muhammad Moideen* v *Chinthamani Chettiar*[2], the defendants had appeared and filed a written statement and an issue had been raised with regard to the plea taken by him But when the case came on for trial, the defendants and plaintiffs filed a joint petition to the effect that the case be postponed for three months with a view to settlement and that if it was not settled, judgment be entered for plaintiffs as prayed for with costs After the period of three months expired the suit was called. The defendants were absent and the foreign Court ordered that the suit be decreed in terms of the order passed on the joint petition already referred to It was held that section 13 (*b*) did not apply There is nothing in this decision to indicate that for the application of section 13 controversy is not necessary. On the other hand, the abovementioned decision of the Privy Council as well as other decisions holding that decrees of the foreign Court passed *ex parte* were not conclusive were distinguished by the learned Judges on the ground that in the case before them, there was a controversy But in the present case there was no controversy. What happened in this case was that both the petitioner and the respondent went to the Yanam Court with a drafted compromise and the decree in question was passed on the strength of that compromise Therefore, when they went to that Court, they had no dispute and there was nothing for the Court to decide. The decree appears to have been given mechanically in accordance with a prescribed rule. It was in effect a mere recognition by a Court of an arrangement already arrived at between the parties In these circumstances, it cannot be said that the decree of the Yanam Court was a decision on merits.

The petition is therefore dismissed with costs

K.C ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE SHAHABUDDIN

The Madras and Southern Mahratta Railway by its General Manager. *Petitioner**

v

Padmanabhuni China Nagiah and Company represented by its managing partner Cheedella Subba Rao *Respondent.*

Railways Act (IX of 1890), *section* 80—*Receiving railway different from delivering railway—Relative positions of—Damage to goods while in the possession of the delivering railway—Delivering railway, if and when liable*

Under section 80 of the Railways Act, the receiving railway is the principal and the delivering railway is its agent and the delivering railway can therefore be held liable for damages only if it is responsible for it Where goods were handed over to one railway for delivery to the respondent at a station on a different railway and the goods were damaged by fire while in the possession of the delivering railway, on a question as to whether the latter was liable,

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1. (1916) 32 M L J. 35 · L R 44 I A 6. I.L R 40 Mad. 112 (P C)

2 (1929) 56 M L J 547 I L.R. 52 Mad. 503

* C. R. P. No 1780 of 1944 19th September, 1945.

Held, that in the absence of proof of negligence that railway was not liable

Chunni Lal v *The Nizam's Guaranteed State Railway Company, Limited*, (1906) I L R 29 All 228 (F. B.) and *Kelu Ram Maigiaj* v *Madras Railway Company*, (1881) I L R 3 Mad 240, followed

Jamunadas Ramjas v. *East Indian Railway Company, Limited*, A I R. 1933 Pat 630, not followed

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Bapatla in S C. S. No. 14 of 1944, dated 16th August, 1944

C. Krishnaswami Aiyar instructed by *King and Partridge* for Petitioner

Kasturi Seshagiri Rao and *P Satyanarayana Rao* for Respondent.

The Court delivered the following

JUDGMENT —This civil revision petition is against the decree of the Subordinate Judge of Bapatla in a small cause suit for Rs 662-5-0 claimed as damages in respect of a consignment of 33 tins and one box of bleaching powder handed over to the Nizam's State Railway at Secunderabad for delivery to the respondent at Chirala, a railway station on the M S. M. Railway, the petitioner The case of the respondent-plaintiff was that of the consignment received by the Nizam's State Railway, only nine tins of the bleaching powder were delivered to him at Chirala railway station and that the rest of the stuff was damaged in transit on the petitioner railway. This railway admitted that the damage was caused by fire while the wagon containing the goods was in the goodsyard of one of its railway stations. But the liability was denied on the ground that the fire was not caused owing to the negligence of the M S M Railway Its defence was that the tins of bleaching powder were loaded at Secunderabad in the same wagon with drums of turpentine and spirit, that the fire resulted from turpentine and spirit having leaked from the drums and come into contact with the bleaching powder The M. S M Railway was not aware that the bleaching powder and turpentine had been loaded in the same wagon and therefore precautions against fire could not possibly be taken. In those circumstances, the M S M Railway must be deemed to have taken as much care of the respondent's goods as a man of ordinary prudence would The learned Subordinate Judge decreed the claim against the petitioner railway holding that as the suit was filed under section 80 of the Railways Act the fact that the damage occurred on the M S M Railway was by itself sufficient to make that railway liable He observed that the M S M Railway might not have been negligent and the negligence that led to the fire might have been on the part of the Nizam's State Railway, but that circumstance did not absolve the M S M Railway. The suit claim was resisted with regard to the quantum of damages also. But the finding in this respect is not questioned here

The only contention advanced on behalf of the M S.M Railway is that from the fact that section 80 of the Railways Act enables the consignor to sue the receiving or delivering railway, it does not follow that the delivering railway is liable even if it has taken the care required under section 72 of the Railways Act. It is said that the M S M Railway can be held liable only if it is established that it had not taken the care which a bailee is expected to take and as the learned Subordinate Judge has not found that the M S M Railway, was negligent the decree should be set aside. The argument advanced on behalf of the respondent is this. The respondent is entitled to damages as fire was due to negligence in loading the goods. The Nizam's State Railway received the goods as an agent of the M S M. Railway and therefore the plaintiff can recover damages from the latter railway even though it was not negligent In support of this contention he relies on *Jamunadas Ramjas* v. *East Indian Railway Company, Limited*[1], where it was observed that the principle underlying section 80 was that the Railway which takes delivery of goods with an undertaking to carry it safe is an agent for the railways over which the goods have to pass in order to reach their destination and *vice versa*.

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1. A.I R 1933 Pat. 630.

I am unable to accept the contention of the respondent. It no doubt finds support in the observation of the Patna High Court referred to above but in *Kelu Ram Maigraj* v *Madras Railway Company*[1], a decision of this Court, relied on by the petitioner, it was held that when two railway companies interchange traffic, goods and passengers with through tickets and invoices, payment being made at either end, the receiving company does not contract with the consignor as agent of the delivering company This is no doubt a decision of 1881 prior to the Indian Railways Act but it appears to me that section 80 is not based on a different principle. A Full Bench of the Allahabad High Court, subsequent to the Railways Act, followed this decision in *Chunni Lal* v. *The Nizam's Guaranteed State Railway Company, Limited*[2]. There it was held that where a railway receives and undertakes to carry goods from a station on its railway to a station on another distinct railway with which it communicates, the contract is with the receiving company for the whole distance and the other railway will be regarded as their agents and not as contracting with bailor. In that case, section 80 was not considered but the view expressed there is relevant to the theory of agency on which the respondent seeks to make the M.S M. Railway liable. If, as contended by the respondent, it is considered that the receiving railway takes the goods as an agent of the delivering railway, then in cases where the damage occurs on the latter railway due to its own negligence, the consignor should not be allowed to sue the receiving railway, as an agent is not liable for the negligence of the principal; but under section 80, he can sue the receiving railway even though the delivering railway is responsible for the damage. Similarly, in cases where evidence is not available as to where the goods were damaged or upon which company's railway system they were damaged, the consignor should proceed under section 80 against the receiving railway (see *South Indian Railway Company* v. *Nanjiah Narayanaswami Pillai*[3]). It therefore appears to me that the underlying principle of section 80 is that the receiving railway is the principal and the delivering railway is its agent. The delivering railway can therefore be held liable for the damage only if it is responsible for it This view is indicated in *Sri Gangaji Cotton Mills Co., Ltd* v. *East Indian Railway Company*[4], on which the petitioner relies I am unable to agree with the Subordinate Judge's view of this decision.

From the above discussion it follows that the M. S. M Railway in this case can be held liable only if it is established that the damage was caused by its negligence. As the Subordinate Judge has decreed the suit without determining this point, the decree has to be set aside. It is accordingly set aside and the case is remanded for disposal according to law in the light of the above observations Costs of this petition will be costs in the suit.

V.P.S. ——— *Case remanded.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—LORD THANKERTON, LORD GODDARD AND SIR JOHN BEAUMONT.

The Commissioner of Income-tax, Bengal *Appellant**

v.

Gurupada Dutta and others *Respondents.*

Income-tax Act (XI of 1922), section 10 (1) (ix) and (4)—Union rate paid under the provisions of the Bengal Village Self-Government Act—If an allowable deduction in computing profits of the business of an assessee.

The total assessable income of an assessee as a Hindu undivided family, carrying on business at Tejhati in Birbhum district, and also at Nalhati and Lohapur, two other villages there, was assessed at a figure which included a sum as being the profits of the Nalhati business assessable under sections 6 (*iv*) and 10 (1) of the Indian Income-tax Act. The assessee claimed a sum paid by the assessee as a Union Board rate in Nalhati under the provisions of the Bengal Village Self-Government Act in respect of the building within the union occupied by the assessee and used for the purpose

1. (1881) I L R 3 Mad 240.
2. (1906) I.L.R 29 All. 228 (F.B.).
3. A.I.R. 1934 Mad. 652.
4. (1922) I.L R. 44 All. 763.

* P. C. A. No. 82 of 1944. 20th November, 1945.

of the business as an allowable deduction in computing the profits of the business under section 10 of the Act The Crown resisted the claim and while admitting that the Union Board rate was a local rate and that it was not levied on the profits of or gains of the Nalhati business, maintained that the Union Board rate was assessed at a proportion of or otherwise on the basis of the profits or gains of the Nalhati business, and as such the case would fall under section 10 (4) of the Act

Held, that in the absence of the necessary powers and machinery, which are not provided in the Bengal Village Self-Government Act, the estimate of the annual income from business can only proceed on a rough guess. Hence, the inclusion of this element of business income as part of the "circumstances" of the assessee as referred to in section 38 (1) of the Bengal Village Self-Government Act with a view to the imposition of the Union rate does not fall within sub-section (4) of section 10 of the Income-tax Act When it is conceded that union rate is not "levied on profits or gains" which clearly implies an ascertainment of such profits or gains, the words "assessed . on the basis of any such profits or gains" in the later part of sub-section (4) of section 10 must also be so limited No such ascertainment of the profits and gains of the business can be undertaken for the purposes of the union rate and hence the argument of the Crown fails

In any case where the union rate is not wholly referable to premises occupied for the purpose of a business or businesses, the assessee on establishing the portion of the rate which is so referable would be entitled to deduct such portion under head (*ix*) of section 10 (1) of the Act

Appeal from the Judgment of the High Court of Judicature at Fort William in Bengal dated the 10th June, 1943,[1] delivered on a reference made to it by the Appellate Tribunal, under section 66 of the Indian Income-tax Act, 1922, as amended and in force during the fiscal year 1940-41.

J. Millard Tucker, K C. and *J. M. Pringle, K.C*, for Appellant.

Respondent *Ex parte.*

Their Lordships' Judgment was delivered by

LORD THANKERTON —This is an appeal from the judgment of the High Court of Judicature at Fort William in Bengal, dated the 10th June, 1943[1], delivered on a reference made to it by the Appellate Tribunal under section 66 of the Indian Income-tax Act, 1922. The respondents did not appear in the appeal.

The respondents constitute a Hindu undivided family carrying on business at Tejhati in Birbhum district, and also at Nalhati and Lohapur, two other villages there. In assessing the respondents to income-tax for the year 1940-41, on the basis of the previous year 1939-40, the Income-tax Officer assessed the total assessable income of the respondents as a Hindu undivided family at Rs. 17,250, in which he included a sum of Rs 6,563, as being the profits of the Nalhati business assessable under sections 6 (*iv*) and 10 (1) of the Act The Income-tax Officer disallowed a claim by the respondents to deduct as an allowance authorised by section 10 (2) of the Act a sum of Rs 84 paid by them as a union board rate in Nalhati under the provisions of the Bengal Village Self-Government Act, 1919 The respondents appealed under section 30 against the order of the Income-tax Officer to the Appellate Assistant Commissioner of Income-tax, Calcutta, B. Range, on various grounds, with only one of which the present appeal is concerned, namely, the claim to deduct the Rs 84 above mentioned, but the Appellate Assistant Commissioner affirmed the disallowance of the deduction. The respondents then appealed under section 33 of the Act to the Appellate Tribunal, who allowed the appeal holding that the payment of the Rs 84 was made for the purpose of the business and was an allowable deduction, in computing the profits of the Nalhati branch On the application of the present appellant, the Tribunal made the reference under section 66, the question referred being,

"Whether the rate imposed under the provisions of the Bengal Village Self-Government Act, 1919, on a person occupying a building within the Union, and using the same for the purpose of business is an allowable deduction in computing the profits of the business under section 10 of the Indian Income-tax Act ?"

It will be convenient in the first place, to state the relevant provisions of section 10 of the Indian Income-tax Act, 1922, as it stood amended at the material date :

"10. (1) The tax shall be payable by an assessee under the head 'profits and gains of business, profession or vocation' in respect of the profits or gains of any business, profession or vocation carried on by him

(2) Such profits or gains shall be computed after making the following allowances, namely —

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1. A.I.R. 1944 Cal. 125 : 1943 I.T.R. 499.

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(ix) any sums paid on account of land revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business, profession or vocation,

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(xii) any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation,

* * * * * * *

(4) Nothing in clause (ix) or clause (xii) of sub-section (2) shall be deemed to authorise the allowance of any sum paid on account of any cess, rate or tax levied on the profits or gains of any business, profession or vocation or assessed at a proportion of or otherwise on the basis of any such profits or gains "

In answering affirmatively the question of law submitted to them the learned Judges contented themselves with expressing agreement with the opinion of the Appellate Tribunal and their reasons therefor

The main argument for the Crown was based on sub-section (4) of section 10 of the Income-tax Act It was admitted that the Union Board rate was a local rate and that it was not levied on the profits or gains of the Nalhati business, but it was maintained that the Union Board rate was assessed at a proportion of or otherwise on the basis of the profits or gains of the Nalhati business.

Alternatively, it was maintained by the Crown that the respondents had failed to bring the rate here in question within either head (ix) or head (xii) of sub-section (2) of section 10 for reasons to which their Lordships will refer later.

The Bengal Village Self-Government Act, 1919 (Bengal Act V of 1919) was intended to develop self-government in the rural areas of Bengal, and the financial provisions are contained in Chapter V of the Act The material sections of the Act and the material Rules made under section 101 (2) (k) of the Act are as follows

"SECTION 37. The union board shall impose yearly on persons who are owners or occupiers or owners and occupiers of buildings, within the union, a rate amounting to—

(a) the sum required, after deduction of the contribution, if any, made by the Provincial Government in this behalf, for the salaries and equipment of the defadars and chaukidars and the salaries of the establishment of the union board, and

(b) the sum estimated to be required to meet the expenses of the board in carrying out any of the other purposes of this Act, if such estimate has been approved by more than half the total number of the members of the board at a meeting specially convened for the purpose,

together with ten per cent above such sums to meet the expenses of collections and the losses due to non-realisation of the rate from defaulters

SECTION 38 (1) The rate to be imposed by a union board under section 37 shall be an assessment according to the circumstances within the union and property within the union, if any, of the persons liable to the same

Provided that the amount assessed upon any person in any one year shall not be more than eighty-four rupees

(2) Any person who, in the opinion of the union board, is too poor to pay half an anna a month, shall be altogether exempted from payment of any rate under this Act.

SECTION 39 The assessment for the imposition of the rate under section 37 shall be made in accordance with rules prescribed under section 101, and any person dissatisfied with the amount at which he has been assessed may, within such time as may be specified in those rules, apply to the union board, either orally or in writing, for a revision of the assessment, and the union board may amend the assessment or confirm the same

SECTION 101. (1) The Provincial Government may, after previous publication, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power the Provincial Government may make rules .

(k) for the making of an assessment by the union board under section 39, for imposing the rate under section 37, and prescribing under section 41 the method and time of payment of such rate.

RULES MADE UNDER SECTION 101 (2) (*k*) THEREOF

ASSESSMENT AND IMPOSITION OF THE UNION RATE

RULE 1 (1) After preparing the annual budget estimate in Account Form No 1 and not less than two months and a half before the first day of the year to which the budget relates, the union board at a meeting shall proceed to assess the union rate provided in the estimate according to the circumstances and the property within the union of the person liable to assessment

Provided that the said period may, for reasons to be recorded in writing, be at any time altered by the District Magistrate

(2) When a union board is for the first time constituted in any union it may assess the union rate for a portion of the year in which it is so constituted or of the year next following

RULE 2 The union board shall first prepare, village by village and in Form No 1, a list of all persons owning or occupying buildings, whether with or without land appertaining thereto, in the union, either permanently or temporarily, showing their trade, business, etc, within the union, and the estimated annual income which they derive from buildings or other property or business within the union All such persons shall be included in the list even if some are subsequently exempted

RULE 3 The board shall, after considering his debts and liabilities, if any, determine the total assessable income of the person concerned, *i e*, the income which he derives from business conducted, or from buildings or other property held, within the union

RULE 5 No person shall be assessed who does not own or occupy a building within the union A person who, though liable to pay the rate, does not reside within the union, shall be assessed on the buildings which he owns or occupies within the union, and on any income which he derives from business conducted, or from landed or other property held, within the union

Explanation—Ownership or occupation includes part ownership or occupation, and ownership or occupation of a building or part of a building for any portion of the year shall render the owner or occupier liable to pay the rate

Note—A person should be deemed to be in occupation of a building who pays the rent of the building directly or indirectly

RULE 10 The assessment list, after being checked by the Circle Officer, or the revised list, if any, prepared under rule 9, shall be published by the union board in the manner laid down in rule 6, if possible before the first day of the year, and if not, as soon as possible thereafter

RULE 11 If any person mentioned in the assessment list ceases at any time after the publication thereof under rule 10 to occupy any building in respect of the occupation of which he has been assessed, or if the means and property in respect of which he has been so assessed are reduced, the union board, at a meeting may exempt him from assessment or revise the same , and such exemption or revision shall take effect from such date as the board may direct"

It is clear that the rate is only imposed on persons who are owners or occupiers or owners and occupiers of buildings within the union, but, in arriving at the amount to be assessed on any such person, it is provided by section 38 (1) that the assessment is to be according "to the circumstances within the union and property within the union, if any," of the assessee, with a maximum limit of Rs 84 in any one year in the case of any assessee. Under section 39 the assessment for the imposition of the rate is to be made in accordance with rules prescribed under section 101.

In order to determine under rule 3, "the total assessable income of the person concerned, *i.e.*, the income which he derives from business conducted, or from buildings or other property held, within the union," the Board have before them the information prepared under rule 2, which shows the buildings occupied or owned in the union, permanently or temporarily, and also "their trade, business, etc., within the union, and the estimated annual income which they derive from buildings or other property or business within the union."

It will be noted that, in the absence of the necessary powers and machinery, which are not provided by the Act, the estimate of the annual income from business can only proceed on a rough guess, which is in no way comparable with the ascertainment of profits and gains under the Income-tax Act, and, in the opinion of their Lordships, the inclusion of this element of business income as part of the "circumstances" of the assessee with a view to the imposition of the union rate does not fall within sub-section (4) of section 10 of the Income-tax Act It is conceded that the union rate is not "levied on the profits or gains," which clearly implies an ascertainment of such profits and gains, and the words "assessed . . . . on the basis of any such profits or gains" in the later part of the sub-section must also be so limited. No such ascertainment of the profits and gains of the business can

be undertaken for the purposes of the union rate The main argument for the Crown therefore fails.

Turning now to head (*ix*) of sub-section (2) of section 10 of the Income-tax Act, the argument for the Crown proceeded on a somewhat meticulous examination of the statement of the case, and the papers in the index which are made part of the reference, in order to show that the respondents, in addition to the premises in which they carry on the Nalhati business, have house property in the village, which would show that the rate was only partly related to the premises used for the purposes of the business, and that the respondents have failed to establish what part of the Rs. 84 is so referable. In the opinion of their Lordships, the decision of the Appellate Tribunal, the question of law referred, and the decision of the High Court, proceed on the footing that the Rs. 84 solely relates to the premises occupied for the purpose of the Nalhati business, and, it being admitted that the union rate is a local rate, the question falls to be answered in the affirmative. Their Lordships may add, however, that in any case where the union rate is not wholly referable to premises occupied for the purpose of a business or businesses, the assessee, on establishing the portion of the rate which is so referable, would be entitled to deduct such portion under head (*ix*) In this view, no separable question appears to arise under head (*xii*), and, in any event, it would be unnecessary to deal with it.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed, and that the judgment of the High Court should be affirmed.

Solicitor for Appellant *The Solicitor, India Office.*

H J U./V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT.—LORD THANKERTON, LORD SIMONDS AND LORD GODDARD.

Messrs. Siddique & Co. .. *Appellants**

v.

Messrs. Utoomal & Assudamal Co .. *Respondents.*

Specific Relief Act (I of 1877), section 31—Essentials to be proved to obtain relief of rectification—Duty of Court before it can rectify—Granting of rectification discretionary

The essential requisite which has to be proved for obtaining the relief of rectification of an instrument under section 31 of the Specific Relief Act is that it was through a mutual mistake of the parties that the instrument in question did not truly express the intention of the parties The duty of the Court, before it can rectify, is to find it clearly proved that there has been mistake in framing the instrument and it must ascertain the real intention of the parties in executing the instrument. On being satisfied of those two elements, it is in the discretion of the Court to grant rectification

In the circumstances, it was held that the plaintiffs had failed to prove that which it was necessary for them to prove, namely, that the word "shipment" in the written contracts in question was used by mistake for the word "delivery" and so did not truly express the intention of the plaintiffs in framing the instrument That necessarily negatived any case of mutual mistake.

Appeal from the judgment and decree of the High Court of Judicature at Bombay in its appellate jurisdiction dated the 13th September, 1943, reversing a decree and findings of the same Court in its ordinary original civil jurisdiction in favour of the appellants who were defendants in the suit

F. A Sellers, K. C. and *D A. Scott Cairns* for Appellants

C. S Rewcastle, K.C. and *S. P. Khambatta* for Respondents.

The appellants and the respondents are both firms of merchants in Bombay In November 1941, negotiations took place at the appellants' shop, between one Popatlal, a broker acting for the respondents, and a representative of the appellant firm

Following the said negotiations three written contracts were entered into between the parties, for the sale of cotton yarn from the respondents to the appellants Each of these contracts was contained in a document called a "forward bill" In each case the forward bill and a duplicate were made out by the respondents, and sent to the appellants, and the duplicate was signed on behalf of the appellants and returned to the respondents Each of the said contracts contained the following words

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* P. C. A. No. 40 of 1944. 13th November, 1945.

"Shipment January/February, 1942 To take delivery as soon as we get"

After considerable correspondence between the parties the respondents on the 18th May, 1942, filed the present suit By their plaint they set up contracts for delivery in January/February, 1942, and alleged that the word "shipment" was used in the forward bills by mutual mistake instead of the word "delivery". They further alleged breach and repudiation of the contract by the appellants

The appellants by their written statement denied that the word "shipment" was used by mutual mistake, and relied on the contract as contained in the forward bills In the alternative they said that if the respondents intended "delivery," by the word "shipment," the parties were not "*ad idem*" and there were no concluded contracts

At the original trial, the suit was dismissed and the respondents who were the plaintiffs in the suit, appealed, and the appeal was allowed and the suit remanded to the trial Judge for the trial of certain issues When the trial Judge had recorded his findings on these issues both parties filed objections to them, and the matter came before the appellate Court for further hearing On that further hearing, the appellate Court allowed the objections of the respondents, and passed judgment for the respondents for the sum of Rs 15,000, damages and the costs of both trials, and both hearings on appeal.

From that decision the appellants now appeal

The principal question for determination before their Lordships of the Privy Council was, whether the three contracts did not truly express the intention of the respondents in framing the instrument, which is a requisite under section 31 of the Specific Relief Act, when rectification is claimed

Arguments :—

Sellers —The word "shipment" was put in to have it both ways The word was deliberately put in well knowing it did not mean delivery Shipment means shipment, no Court should therefore equitably set aside the contract The respondents were not entitled to rectification (Pollock and Mullah, p 827, referred to on rectification)

Lord Simonds —There is no explanation given why the word "shipment" was used This makes it rather suspicious The plaintiff should come into Court with clean hands—that is a fundamental principle of equity

Sellers —Nanakram has alleged that he did not know the difference between the words shipment and delivery His evidence was discredited by the trial Court The High Court, however, although they accepted the trial Judge's appreciation of the evidence, which included the discrediting of Nanakram as a witness, came to the conclusion that the word "shipment," combined with the words "to take delivery as soon as we get", meant the same thing as delivery This could not have been Nanakram's intention In a contract made with one Nathalal (p 77 in the Record), Nanakram had given instructions to the broker that if Nathalal objected to the word "shipment," which was also in that contract, then it could be altered to delivery, following such objection the word "shipment" was deleted and word "delivery" was substituted

Rewcastle —It is clear from the correspondence between the parties and upon the facts as found by the trial Court that the real agreement, between the parties was that the goods contracted to be sold were to be of January/February delivery, and not of January/February shipment The appellate Court was right in regarding the real question as being whether there was evidence of mutual mistake The only person who could prove the purpose of putting the word "shipment" into the three contracts was Nanakram The High Court accepted his testimony as showing that the word "shipment," combined with the words "to take delivery as soon as we get," meant delivery This finding should not be disturbed

Their Lordships' Judgment was delivered by

LORD THANKERTON —In this appeal it became obvious that there was one crucial point, the decision of which might supersede consideration of any further points.

Their Lordships wish to recall the essentials which have to be proved under section 31 of the Specific Relief Act of 1877. The plaintiffs (the present respondents) must prove that it was through a mutual mistake of the parties that the three contracts in question did not truly express the intention of the parties ; and the duty of the Court, before it can rectify, is to find it clearly proved that there has been mistake in framing the instrument, and it must ascertain the real intention of the parties in executing the instrument. On being satisfied of those two elements it is in the discretion of the Court to grant rectification.

In the present case it is unnecessary to consider the appellant-defendants' conduct or view *vis-a-vis* the question of mistake The vital question in the appeal is whether the plaintiffs (the present respondents) have established that there was mistake on their part within the meaning of section 31.

Mr. Rewcastle, in a very frank and able statement, has admitted, and has rightly admitted, that the only person who could prove the purpose of putting

the word "shipment" into the three contracts with which the present case is concerned was the witness Nanakram.

The case made, briefly put, was that Nanakram did not know the difference between the meaning of the word "shipment" and the word "delivery." Both Courts in India are agreed that commonly there is a very material distinction between the two words, and the real question is whether it can be accepted at Nanakram's hands that on the 5th and 6th December, 1941, he did not know the difference between those two words.

The learned trial Judge found difficulty in accepting that suggestion from Nanakram It seems to be quite clear on his judgment that he did not accept it, and he held that the plaintiffs had failed to prove that alleged understanding and purpose of Nanakram in inserting the word "shipment" in the three contracts

When the matter came before the High Court, the Chief Justice and Mr Justice Chagla were agreed in accepting the trial Judge's appreciation of the evidence, which included a discrediting of Nanakram as a witness; but Mr Justice Chagla said in reference to Nanakram's evidence · "But, in the midst of contradictions and falsehoods which he has indulged in, one fact clearly emerges, and that is that he thought that the expression 'shipment' combined with the words 'to take delivery as soon as we get' meant the same thing as 'delivery' and when he inserted this expression in the contract he meant the same thing as if he had inserted 'January/February delivery'."

Their Lordships find themselves unable to agree with that finding, because they are, at the very least, of opinion, agreeing with the trial Judge, that Nanakram has failed to prove that such was his understanding, but their Lordships are prepared to go further, in view of the fact that in relation to a contract concluded on the 4th December with some people called Nathalal, Nanakram had given instructions to the broker that, if Nathalal objected to the word "shipment," which was in that contract as drawn by Nanakram, it would be altered to the word "delivery" and that following an objection by Nathalal being reported by the broker, in the result the word "shipment" was altered to "delivery" by Nanakram. That was done before he knew of any of the three contracts with the defendant-appellants in this case · yet he retains the word "shipment" in their contracts.

That of itself to their Lordships' minds is rather suggestive of the fact that he thought that there was some difference, or some advantage to him, in retaining those words; but when their Lordships find, a few days later, a contract of the 10th December 1941, made by Nanakram with other parties, which contract was also for "shipment," they have this finding by the trial Judge. "In respect of this contract correspondence took place between the plaintiffs and their purchasers. The plaintiffs insisted in the correspondence that those were shipment contracts and not of delivery." It does seem to be impossible to believe Nanakram when he maintains that until he came into the witness box he did not know that that there was any distinction between "shipment" and "delivery"

Therefore, their Lordships agree with the trial Judge, when he said that he could not accept that view put forward by Nanakram, but, their Lordships go further, and do not believe it

The result is that the plaintiffs have failed to prove that which it is necessary for them to prove, namely, that the three written contracts did not truly express the intention of the plaintiffs in framing the instrument, which is the requisite under section 31 of the Specific Relief Act This necessarily negatives any case of mutual mistake

That point having been decided adversely to the present respondents, the result is that further consideration of any other points becomes unnecessary and it follows that the appeal should be allowed, the judgment of the High Court as an appellate Court should be set aside and the judgment of the High Court in its original jurisdiction dated the 7th December, 1942, should be restored with costs

as stated therein. The respondents will pay the appellants' costs of this appeal and of the proceedings in the High Court since 7th December, 1942.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellants: *Gregory, Rowcliffe and Co.*

Solicitors for Respondents *T. L. Wilson and Co*

H J.U./V.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the Chief Court of Oudh at Lucknow.)

PRESENT :—VISCOUNT SIMON, LORD THANKERTON AND SIR JOHN BEAUMONT.

Bhup Lal and others .. *Appellants**

v

The King-Emperor - *Respondent.*

Criminal Procedure Code (V of 1898), *sections* 211 (1), 291 *and* 540—*Witness included in list filed under section* 211 (1) *and witness not so included—Defence, if entitled to the presence of those witnesses at the sessions trial*

One of the witnesses included in the list filed on behalf of the accused under section 211 (1) of the Criminal Procedure Code and another not so mentioned and for whose examination the defence did not apply under section 540 were not available to the accused at their trial in the Sessions Court On a question whether there was any irregularity in the proceedings which would constitute a grave miscarriage of justice unless the appeal were allowed,

Held, that as regards the witness mentioned in the list, the defence chose to drop that witness and neither the committing magistrate nor the Court of Session was in any way at fault

As regards the other witness, there was no right in the defence to have him brought before the Court. That followed from section 291 of the Criminal Procedure Code The defence could have applied under section 540 of the Code to the Sessions Court, but did not do so In the circumstances there did not appear even to have been any irregularity

Appeal by way of special leave from the Judgment of the Chief Court of Oudh at Lucknow, dated the 22nd September, 1944, affirming the conviction of murder and the sentences of death passed upon the appellants under section 302 of the Indian Penal Code by the Sessions Judge of Kheri by his judgment dated the 9th August, 1944.

S P Khambatta and *H J Umrigar* for Appellants

B. MacKenna for Respondent.

Arguments —

Khambatta.—The principal question for determination is whether the trial resulting in the conviction of the appellants has been vitiated by the refusal by the Court of first instance to grant the appellants facilities for the production and examination of two witnesses

Lord Thankerton —You will have to satisfy us that there was a refusal

Khambatta —If I do not satisfy your Lordships as to that point then that is an and to the case, as no question arises as to the merits of the cse. As regards the witness Bhagwandas his name was on the list filed under section 211 (1). We were entitled as of right to his presence at the Sessions Court, this follows from the provisions of section 216

Lord Thankerton —Surely your point comes under section 90

Khambatta.—As regards the other witness Sardar Bahadur we were not entitled to his presence as of right, as his name was not on the list of witnesses filed under section 211, (1) In his case we were given a dasti summons, such a summons was not legal under the provisions of section 68 of the Code of Criminal Procedure It is true that we could have summoned this witness under the provisions of section 540 but we did not do so

Counsel for the respondent was not called upon

Their Lordships' Judgment was delivered by

VISCOUNT SIMON —This is an appeal, by way of special leave to appeal, from the judgment of the Chief Court of Oudh, at Lucknow, confirming the conviction of murder and the sentence of death passed upon the three appellants. Special leave was given in order that, in the light of fuller information, the Board might

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*P.C A. No 19 of 1945 20th November, 1945

bear the argument, which has been very clearly and candidly advanced by Mr. Khambatta this morning, to the effect that there was some irregularity in the proceedings which would constitute a grave miscarriage of justice unless the appeal were allowed.

There are two proposed witnesses for the defence named in the case As regards Bhagwan Dass, he was properly included in the list of witnesses whom the defence wished to summon and, after the date of the trial had been fixed by the Sessions Court for 1st August to 3rd August, the last of those days being allotted in advance for the defence, Bhagwan Dass was properly served by a summons issued by the committing magistrate to appear on the 3rd August However, the summons did not reach this gentleman's hands, at his residence some fifty miles off, until the afternoon of the 2nd August, owing to his having been away when the effort was first made to serve him. He at once communicated by telegraph to the Sessions Court, informing the Court that he had only just been served and that the time was too short, especially as there was no vehicle available, to enable him to appear, as the summons called upon him to do, at 10 A M on the 3rd August. The next morning that fact was mentioned by the Court when the case was being dealt with, and we must proceed on the basis, which everybody accepts, that the time was too short for Bhagwan Dass to appear at the time and date mentioned in the summons

As it happened, the trial of the case was postponed until the 7th August—it may very well be not on this account, but because of some arrangement already made. That being so, the practical thing to do was to let Mr Bhagwan Dass know that it was on the 7th August, that he would be needed. The Court asked the defence to let him know this. The defence did not do so ; they preferred to drop the witness

In these circumstances, as it appears to their Lordships, there is nothing whatever to complain about in the case of the witness Bhagwan Dass.

At one time it almost appeared that the point arose under section 216 of the Code of Criminal Procedure, which directs what the committing Magistrate has to do in relation to summoning witnesses ; but, as has been pointed out during the argument, the committing Magistrate had exhausted all his powers and duties under that section, and it is not suggested that the committing magistrate was in any way in fault ; he was completely *functus officio*, so far as this was concerned. If anybody was in fault, it would be the Sessions Court ; but there was not really any fault there The Court did not proceed high-handedly It was glad, no doubt, that there would be plenty of time for this gentleman to appear, and it gave the defence the opportunity of telling him so.

It does not seem that there is any other ground for complaint as regards that witness

As regards the other gentleman, Sardar Bahadur, he was not on the defence's list at all. There was no right in the defence to have him brought before the Court That appears to their Lordships to follow from section 291 of the Code of Criminal Procedure The defence could have applied, if it had thought right to do so, under section 540 of the Code of Criminal Procedure, to the Sessions Judge ; but they did not do so

In these circumstances, it appears to their Lordships that there is no good ground for thinking that there has been a miscarriage of justice in this matter at all. There does not appear even to have been any irregularity

The consequence is that their Lordships will humbly advise His Majesty that this appeal should be dismissed

Solicitors for Appellants : *Hy S L Polak & Co.*

Solicitor for Respondent : *The Solicitor, India Office.*

H J.U./V.S. *Appeal dismissed.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD THANKERTON, LORD GODDARD AND SIR JOHN BEAUMONT

K.A Krishna *Appellant**

v

The Indo-Union Assurance Co., Ltd. .. *Respondent.*

Company—Secretary—Appointment under agreement—Construction of agreement—If precludes appointment of a general manager subsequently

Under the Articles of Association a Company was empowered to appoint and in their discretion to remove or suspend managers, secretaries, officers, clerks, agents and servants of the Company. The company appointed the appellant as secretary on 17th November, 1939 for a period of 5 years whose duties were set out in the agreement between him and the company and who was in the discharge of his duties to be subject to the control of the directors and of the managing agents and obey all directions or orders from time to time given to him On 29th July, 1941 a general manager was appointed by the directors of the company and on the secretary objecting to the right of the directors to make such an appointment and failing to get redress absented himself and filed the suit for damages On a question as to whether he was entitled to the relief claimed,

Held, agreeing with the Judgment of the High Court, that the secretary was a servant of the company and was bound to carry out the duties assigned to him and that the agreement between him and the Company could not be read as precluding the latter from appointing a general manager and that as the secretary left his employment without reason he was not entitled to bring the suit for damages.

The Judgment of the High Court appealed against was as follows

The Chief Justice —The apellant-company appeals agasinst the decree passed in a suit tried on the Original Side of this Court awarding damages to the respondent for wrongful dismissal On the 17th November, 1939 the appellant appointed the respondent the secretary of the company and on the 5th April, 1940 the terms of his employment were reduced to writing On the 23rd July, 1941 the company appointed one K S. Ramamurthi to be its general manager The respondent resented this and on the 29th of that month he absented himself from the office He subsequently applied for leave, but this was refused. He did not return to his duties and on the 20th October, 1941 he filed this suit claiming a decree for Rs 17, 735 as damages for wrongful dismissal. The learned Judge (Chandrasekhara Aiyar, J) held that he had been wrongly dismissed and awarded him the sum of Rs 6,830

The respondent agreed to serve the appellant as the secretary of its business at Madras for a period of five years from the 17th November, 1939 Clause 3 states that during the continuance of his employment under the agreement the respondent shall devote his whole time to his duties "as such secretary" and do all in his power "as such secretary" to extend and increase the business of the company Clause 5 defines what his duties were to be

It reads as follows

"The secretary shall at all times keep or cause to be kept in proper books full and correct accounts of all receipts, payments, transactions and dealings of and in relation to the business of the company". Clause 7 provides that the secretary shall in the discharge of his duties be subject to the control of the directors and of the managing agents and obey all directions or orders from time to time given to him The managing agents of the Company are the firm of Murupagappa & Sons

Article 135 of the Articles of Association states that the business shall be carried on by the managing agents, subject to the supervision of the directors There can be no doubt that the managing agents were in charge of the management of the company at all times material to the suit Article 139 (ii) empowers the company to appoint and in their discretion remove or suspend managers, secretaries, officers, clerks, agents and servants of the company

The plaintiff's case is that, subject to the control of the managing agents, he was the principal administrative officer of the company in Madras and that the directors had in the circumstances no right to appoint a general manager This contention cannot be accepted in view of the terms of his employment which are set out in the agreement of the 5th April, 1940 The plaintiff was appointed merely as secretary His duties were defined, and he was subject to such directions as the directors or managing agents might give him In *Barnett* v *South London Tramways Co*,[1] Lord Esher, M R, said —

"A secretary is a mere servant, his position is that he is to do what he is told and no person can assume that he has any authority to represent anything at all."

This dictum was aproved of by the House of Lords in *George Whitechurch, Limited* v *Cavanagh*,[2]

As we have indicated the general duties of the secretary were set out in paragraph 5 of the agreement and he had as a servant of the company to carry out any further duties which were assigned to him The agreement certainly cannot be read as precluding the appelant from appoint-

*P.C Appeal No. 52 of 1945. 18th October, 1945.

1. (1887) 18 Q B.D. 815. 2. (1902) A.C. 117 at 124.

ing a general manager The plaintiff left his employment without reason and was not entitled to bring this suit. The appeal will be allowed and the suit dismissed with costs here and below

The plaintiff has filed a memorandum of cross-objection, but in view of our decision the objection does not arise and must be dismissed

C. S. Rewcastle, K. C. & Robert Ritson for Appellant.

J. M. Pringle, K. C & T. B W. Ramsay for Respondent

Their Lordships' Judgment was delivered by

LORD THANKERTON.—After hearing Mr. Rewcastle's full and able address on behalf of the appellant their Lordships find themselves in entire agreement with the judgment of the High Court, and in particular with the concluding sentence, that the agreement certainly cannot be read as precluding the respondent company from appointing a general manager.

It follows that their Lordships will humbly advise His Majesty that the appeal should be dismissed.

Solicitors for Appellant : *Douglas Grant & Dold.*

Solicitors for Respondent *Barrow, Rogers & Nevill.*

V.S. *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE SOMAYYA.

Ravi Tirupathi Naidu (died) and others .. *Appellants**

v.

Rajah Kaminayuni Krishnappa Nayanim Varu, being minor represented by the Manager of the Court of Wards and another *Respondents.*

Madras Estates Land Act (I of 1908). sections 51 and 3 (11)—Patta and muchilika with respect to pasture land—Conditions apart from statement of rent cannot be introduced

A patta and muchilika cannot be enforced in respect of lands set apart for pasturage The only possible exception is that by express language of section 51 (1) of the Estates Land Act a sum payable by a ryot on account of pasturage fees may be mentioned in the patta. No other condition can be introduced in a patta and muchilika in respect of land given for pasturage purposes.

Where pattas containing conditions as to the rent payable in case dry crops are raised and as to the tenants having merely grazing rights in the land were tendered to tenants who have been in possession of pasture land for a long time paying a fixed rent,

Held, that such conditions could not be introduced in the patta in regard to those lands and that they should be deleted in the pattas and muchilikas.

Second appeal against the decree of the District Court of Nellore in A. S. No. 259 of 1942, preferred against the decree of the Court of the Deputy Collector of Kandukur, Kandukur Division, in Revenue Suit No 155 of 1941.

A. Venkatachalam for Appellants.

K. Umamaheswaram for Respondents.

The Court delivered the following

JUDGMENT.—The suit is by the landholder to enforce the acceptance for fasli 1350 of a patta tendered by him and for execution of a muchilika by the defendants ryots. The muchilika which the landholder wants the ryot to execute is marked as Ex A The patta is not separately marked and I directed it to be marked as Ex. R. The defendants are ryots holding ryoti land under the Chundi estate of which the plaintiff is the landholder. There were two defendants in the suit. The first defendant died pending the second appeal and his legal representatives now continue the appeal.

The sole question is whether certain conditions contained in Ex. R, the patta sought to be enforced and in Ex A the muchilika sought to be executed by the ryot are legal and whether they ought to find a place in the patta and muchilika. Both

*S.A. No. 1252 of 1944. 11th October, 1945.

the patta and muchilika comprise two items, S. Nos 59 and 80 S No. 59 is admittedly a ryoti land and there is no dispute as regards the terms of the patta and muchilika as regards that land S. No 80 is stated by the plaintiff to be a pasture land and to have been given for pasturage. The defendants stated that the land, S No 80, was in their possession for a long time, paying a fixed rent of eight annas per Gorru. They object to paragraphs 8 and 12 in the patta and in the muchilika. Clause 8 says that in respect of pasture lands in the possession of the defendants, if any dry or wet crops are raised the tenant is to pay kist at the rate prevailing for similar lands in the neighbourhood; and if in respect of such lands a third party offered to take the whole or any portion of it at a particular rate of rent then option is to be given to the tenant defendant to take those lands at the rate offered by the third party. If he consented to take the lands at that rate the landholder is to give these lands to the tenant but if the tenant did not agree to take the lands at those rates the tenant should give up those lands. Clause 12 says that in respect of lands included in section I, the tenant is to have permanent rights of occupancy; in respect of lands mentioned in section II, the tenant is not to have any permanent rights of occupancy and in respect of lands included in section III the tenant is to have only the right of grazing cattle and no other right In the schedules attached to Ex. A, R S No. 59 is mentioned under section I and S. No. 80 is mentioned under section III, both with the heading *Saswatha hakku kalavu*, or land in which there is a permanent right Mr. Venkatachalam, the learned advocate for the appellant, urges that in respect of a land which is given for pasture purposes—which he says is the case of the plaintiff—no conditions can be introduced in a patta and muchilika under section 51 of the Estates Land Act with the possible exception of the sum payable on account of pasturage fee Mr. Venkatachalam does not object to the sum of Rs. 7-5-2 mentioned in the document as the sum payable in respect of S. No. 80. But he objects to clauses 8 and 12 being retained in the patta and muchilika. I think this contention must be upheld. On the plaint case S. No. 80 is only pasture land and was given out for pasture. If so it is not ryoti land and the tenant does not hold it for purposes of agriculture Chapter IV of the Estates Land Act begins with section 50 It says that the provisions of the Chapter shall apply to all ryots. Section 51 says that the patta shall contain the names of the parties, the rate or amount and the nature of the rent payable thereon, etc., etc. And rent is defined as whatever is lawfully payable in money or in kind or in both to a landholder by a ryot for the use or occupation of land for the purpose of agriculture; and sub-paragraph (2) of section 3 (11) says that for the purposes of certain sections named in it a sum lawfully payable to a landholder by a ryot as such on account of pasturage fees is also rent; but the sections in respect of which a sum payable by a ryot on account of pasturage is deemed to be rent do not include sections 51 to 55. Therefore, a patta and muchilika cannot be enforced in respect of lands set apart for pasturage. The only possible exception is that by express language of section 51 (1) a sum payable by a ryot on account of pasturage fees may be mentioned in the patta It is unnecessary to go into that question because the appellant-tenant does not object to the Rs 7-5-2 being retained as the sum payable on S. No. 80. But the other conditions with respect to S No 80 cannot be introduced in either the patta or muchilika. They must be the subject of a different agreement and they cannot be introduced in either Ex. A or Ex. R. Clauses 8 and 12 in the patta and muchilika will be deleted and the appellants are directed to accept a patta in terms of Ex. R with the clauses 8 and 12 omitted and to execute a muchilika in terms of Ex A with a similar deletion of clauses 8 and 12 In the schedule as against S. No 80, the words "Section III" will have to be omitted. The appellant will have his costs in all the Courts.

No leave.

V.P.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Nedumkandathil Koyakutty .. *Appellant**

v.

Kunhali and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 41, *rule* 27 (c) (*Madras*) *and rule* 29—*Summoning of Court witness by appellate Court—Failure of Court to give reasons or specify the points to which the evidence was to be confined—Legality of procedure.*

Where a Judge of an appellate Court examined a person as a Court witness and did not at that time pass any order giving reasons for the course he was taking but later on in the judgment of the case stated that he felt that the evidence on record was not sufficient to enable him to come to a conclusion on the point involved in the controversy and that it was necessary to record the evidence of the witness concerned, on a question as to the legality and propriety of the procedure followed by the appellate Judge,

Held, that the procedure indicated in Order 41, rule 29 of the Civil Procedure Code was not followed as the appellate Judge had not specified the points to which the evidence was to be confined before the examination took place The fact that a Court uses words which are to be found in the enactment which gives it power to do a particular act or follow a particular procedure will not *ipso facto* be sufficient justification for its act or order The reasons given by the Judge do not amount to a fulfilment of the conditions imposed on the Court by Order 41, rule 27 (*c*) (as amended in Madras) Apart from the irregularity, in the circumstances, the lower appellate Court was not justified in using the extraordinary power conferred on it which must be resorted to only in special circumstances and with adequate safeguards

Appeal against the decree of the District Court, South Malabar, in A. S. No. 48 of 1941, preferred against the decree of the Court of the Subordinate Judge, South Malabar at Calicut in O. S. No. 7 of 1940.

B. Sitarama Rao and *T. Krishna Rao* for Appellant.

K. Bashyam and *G. Gopinath* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit brought for the recovery of a sum of Rs 4,387-4-0 as arrears of rent and the *Jenmabhogam* due to the plaintiff's tarwad under a kaichit dated 28th August, 1929, executed by defendants 1 and 2 in favour of the plaintiff's tarwad and interest thereon. The main plea of the defendants was a plea of discharge and in support of it they produced three receipts, Exs. II, III and IV and a letter Ex. V. All these documents bear the signature of Chappunni Valia Nair, a former karnavan of the plaintiff's tarwad, who died sometime in June, 1939 and was succeeded by the plaintiff. The defendants also say that there is a signature of the plaintiff himself on Ex II. The plaintiff denied that there was any payment as recited in the said receipts. He denied that he ever signed on Ex. II He further pleaded that these receipts must have been granted by the kariasthan at the time one Krishna Menon to defendants 1 and 2 as a result of fraud and collusion between them and him The learned Subordinate Judge of South Malabar on a consideration of the oral and documentary evidence tendered by both the parties, held against the defendant's plea of discharge and granted a decree to the plaintiff. The defendants appealed to the District Judge, South Malabar. After hearing arguments in part, the learned Judge summoned Krishna Menon, the kariasthan as a Court witness and allowed him to be cross-examined by both sides. He took into account his evidence along with the other evidence already on record and disagreeing with the trial Court, dismissed the plaintiff's suit.

Among other grounds, Mr. Sitarama Rao for the plaintiff-appellant in the second appeal put forward as a main ground that the lower appellate Court was not entitled in law to summon and examine Krishna Menon and the conditions requisite under Order 41, rules 27 and 29 were not fulfilled in this case. It is common ground that the only provision which applies to this case is Order 41, rule 27, clause (*c*) (as amended in Madras) which is as follows :

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* S. A. No. 819 of 1944. 19th September, 1945.

"(c) The appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause."

Rule 29 of Order 41 is as follows :

"where additional evidence is directed or allowed to be taken, the appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified"

It is not disputed that at the time when the learned District Judge decided to examine Krishna Menon as a Court witness, he did not pass any order giving any reasons for the course that he was taking The diary for the case shows as against 2nd September, 1943, the following entry :

"Respondent's arguments also heard in part The appeal is posted to 7th September, 1943, to examine T. Krishna Menon as a Court witness Emergent summons will be issued to him."

On 7th September, 1943, Krishna Menon was examined as a Court witness; the arguments were completed the next day and judgment was reserved. The judgment was finally pronounced on the 21st September, 1943, and in paragraph 5 of the judgment the learned Judge explains why he thought it was necessary to examine Krishna Menon. He says that he felt that the evidence on record was not sufficient to enable him to come to a conclusion on the point involved in controversy and that it was necessary to record the evidence of the erstwhile kariasthan, that is Krishna Menon, who had not been examined either by the plaintiff or by the defendants in the lower Court or by the lower Court as a Court witness although it was definitely alleged on the plaintiff's side and found by the lower Court on the materials on record that the receipts had been granted by him as a result of fraud and collusion between him and the defendants. Admittedly, except in this paragraph, there is nowhere else any record of any reasons. Obviously, the procedure indicated in Order 41, rule 29 was not followed. He nowhere specified the points to which the evidence was to be confined before the examination took place and I do not agree with the respondents' counsel that the learned Judge ought to be presumed to have summoned him to be examined on the points which would arise on the plea of the plaintiff that the receipts were fabricated by the witness and defendants 1 and 2.

Apart from this irregularity, I am of opinion that the lower appellate Court was not justified in using the extraordinary power conferred on an appellate Court under the provision and the present case comes within the scope of the ruling of the Judicial Committee in *Manmohan Das* v. *Musammat Ramdei*[1]. In that case the question at issue was whether a deed of gift executed by one Behari Lal in favour of his wife represented a genuine transaction or was fictitious The Subordinate Judge found that the transaction was fictitious. From the evidence adduced before the Subordinate Judge it appeared that one Mr. Dube, a barrister of the District Court, had been much involved in the transactions under examination He had not been called as a witness by either party When the case came before the High Court on appeal, the High Court called Mr. Dube as a witness for the Court The High Court in that case, as the District Judge in this case, did not pass any order at the time they decided to summon Mr. Dube for examination. In the judgment of the High Court, there occurred the following passage :

"Mr Dube had not been examined in the Court of the Subordinate Judge, who remarks in his judgment that he ought to have been produced as a witness for the defence We agree that it was desirable to have the evidence of Mr Dube, and we think the Subordinate Judge might very well have done what we have done, namely, send for Mr Dube and examine him as a Court witness."

It may be mentioned in passing that this is exactly what the learned District Judge in this case thought, namely, that the Subordinate Judge himself might have examined Krishna Menon as a Court witness Their Lordships of the Judicial Committee after referring to the provisions of Order 41, rules 27 and 29, say as follows :

"The examination of Mr Dube in the High Court seems to have taken place with complete disregard of these requirements, so carefully framed to ensure that such exceptional procedure shall be resorted to only in special circumstances and with adequate safeguards Their Lordships have

1. (1931) 34 L.W. 7 (P.C.).

before them no order or pronouncement requiring Mr Dube's examination, there is no record of the reason for the admission of his evidence other than the passage just quoted from the judgment of the High Court, nor is there any specification of the points to which his evidence was to be confined or any record in the proceedings of the points so specified Moreover, Mr Dube appears to have been called as a witness at the outset of the hearing in the High Court and not after the Court had satisfied itself on examining the evidence taken below that there were matters on which his evidence was essential to enable them to do justice between the parties

In these circumstances their Lordships cannot regard the introduction of Mr Dube's evidence otherwise than as highly irregular, and in their opinion it must be entirely discarded "

Mr. K. Bhashyam, the learned advocate for the respondents, said that their Lordships of the Privy Council were influenced by the fact adverted to last by them, namely, that Mr Dube was called at the outset of the hearing in the High Court and not at a later stage after an examination of the evidence already on record. I do not agree with him This reason is given only as an additional reason and it is clear to my mind that even without this fact, their Lordships would have come to the same conclusion, namely, that the introduction of Mr Dube's evidence was highly irregular. It will be apparent how the case before the Judicial Committee is in every respect similar to the present case What the learned District Judge apparently thought was that as Krishna Menon (like Mr. Dube) was a person who had been much involved in the transaction under examination, it was desirable to have his evidence.

In the same judgment in dealing with the examination of Behari Lal as a Court witness, their Lordships of the Privy Council strongly condemn the procedure of the trial Court in summoning that witness as a Court witness. It is in evidence in this case that this Krishna Menon was as a matter of fact summoned as a witness for the defence but the defendants apparently for reasons best known to them, decided not to call him (*vide* evidence of D W. 3)

Mr. K Bhashyam for the respondents urged that the learned Judge had said that the evidence of Krishna Menon was necessary to enable him to come to a conclusion on the point in controversy and therefore it is not open to me to take objection to the examination of Krishna Menon as an additional witness. But the fact that a Court uses words which are to be found in the enactment which gives it power to do a particular act or follow a particular procedure will not *ipso facto* be sufficient justification of its act or order In this case the reasons given by the District Judge in paragraph 5 cannot amount to a fulfilment of the conditions imposed on the Court by Order 41, rule 27 (*c*). In this connection I may also refer to the decision of a single Judge of the Lahore High Court in *Roshan Lal* v *Charan Das*[1], but I do not consider that there is anything in that case which compels me to hold in any particular way Apparently the learned Judge in that case was satisfied with the reasons given by the lower appellate Court because he says that the Subordinate Judge gave good reasons for calling a witness The decision of a Division Bench of this Court in *Narasimhamurthi* v *Hayat Khan*[2] does not carry us any further than the ruling of the Privy Council in *Manmohan Das* v. *Musammat Ramdei*[3].

As in my opinion the lower appellate Court ought not to have admitted the additional evidence of Krishna Menon and therefore that evidence must be entirely discarded and as it also appears to me that the judgment of the lower appellate Court was materially influenced by this incompetent testimony, the only course left to me is to remand the appeal to the District Court for fresh disposal according to law The costs of this second appeal will abide and follow the result of the appeal. The Court-fee paid by the appellant will be refunded to him

Leave refused

V.S. ——— *Appeal remanded for fresh disposal.*

1. A I R. 1937 Lah 115 2 (1940) 2 M L J 287
3 (1931) 34 L W. 7 (P C)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Maddela Yenadi and another .. *Appellants**

v

Maddela Ramalakshuamma .. *Respondent.*

The Madras Hindu Religious Endowments Act (II of 1927), section 44-A—Enfranchisement and re-grant of Devadasi service inam—No extinguishment of old title and creation of a new one

The general rule that, where service inams are resumed and there is a re-grant, the original title is extinguished and that, the grant constitutes the root of a fresh title does not apply to all service inams irrespective of their nature

As regards a Devadasi service inam, there is no rule that its enfranchisement under section 44-A of the Madras Hindu Religious Endowments Act extinguishes the old title and creates a new one

Appeal against the decree of the Court of the Subordinate Judge, Nellore, in A.S. No. 226 of 1943 preferred against the decree of the Court of the District Munsiff, Kavali, in O.S. No. 17 of 1937.

K. Krishnamurthi for Appellants.

Ch. Raghava Rao for Respondent

The Court delivered the following

JUDGMENT —There is a line of cases which hold that, where service inams are resumed by the Government and there is a re-grant, the original title is extinguished and the grant constitutes the root of a fresh title, but this line of cases does not apply to all service inams irrespective of their nature Most of them on examination will be found to relate to village officers' inams, with reference to which there is a rule of public policy to be kept in mind. As regards a Devadasi service inam, which is the nature of the property involved in this case, there is no rule that an enfranchisement extinguishes the old title and creates a new one On the other hand, the very section 44-A of the Madras Hindu Religious Endowments Act, under which the enfranchisement was made, takes care to state that an enfranchisement order shall not operate as a bar to the trial of any suit or issue relating to the right as to the enjoyment of the land or the assignment of land revenue, as the case may be

The learned Subordinate Judge has held that the plaintiff's father-in-law Pitchanna had a one-third share in this property and that Ex. F mentions his name and that of the third defendant Subbi He has further held that on the father-in-law's death, the one-third share was inherited by Garatadu, the husband of the plaintiff, and that on his death, the plaintiff got title to this share. This is a point of view to which no exception can be taken except on the ground that the grant of a patta in favour of the third defendant must be taken to mean that the previous title was terminated As stated already, that ground is not available

The learned Subordinate Judge has further found that the plaintiff was in possession of this property within twelve years prior to the filing of the suit as she was living with her husband, who was admittedly in possession, and there were at least two instances in which she paid the cist for the property on her own behalf It is therefore a case in which the plaintiff has title and possession

It is argued that the trespass alleged in the plaint was not made out and no finding was given on issue No. 10. When title is denied, a trespass set up need not be specifically made out.

As regards issue No. 10, all that need be said is that it is not necessary to take proceedings to set aside the Government order resuming the service inam and

* S. A No. 2107 of 1944. 23rd October, 1945

granting a patta to the third defendant so long as the plaintiff is prepared to say that that order is one by which she is prepared to abide as her title to the property was not taken away by what was done. So long as the plaintiff's rights in the property are not destroyed, it does not really very much matter in whose name the patta stands.

The second appeal is dismissed with costs. No leave.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Devarandi Chettiar .. *Appellant**

v.

Sivasubramania Chettiar and others .. *Respondents.*

Minor—Alienation by guardian—Duty of creditor to prove consideration and necessity—Mother executing mortgage as guardian—Minor, if bound to prove ill-feeling between himself and his mother or that she was a reckless or careless person

Undoubtedly it is the duty of a creditor who seeks a decree against the minor's estate on the strength of a mortgage executed by the minor's guardian to prove both consideration and necessity. In cases where the lender is a stranger who may not know the circumstances of the family, representations made by the guardian may, in some cases, even without independent enquiries, be enough to support the transaction if the alienee acted *bona fide* and in good faith, *i e*, if he believed the representations of the guardian and if there was no call to make independent enquiries The fact that the mother was the guardian who executed the document is not a relevant consideration and there is no duty on the part of the minor to prove that there was ill-feeling between nimself and his mother or that his mother was a reckless or careless person

In the circumstances, *held*, that as the alienee was the minor's mother's sister's husband living next door to the minor's mother the test to be applied to a *bona fide* alienee could not be applied to the case

Appeal against the decree of the District Court, Coimbatore, in A S No 329 of 1943 preferred against the decree of the Court of the District Munsiff, Coimbatore, in O.S. No 910 of 1941.

T. K Subramania Pillai for Appellant.

S. Panchapakesa Sastri and *P. S Ramachandran* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit filed on a mortgage deed executed by the first defendant's mother as his guardian for a sum of Rs. 1,500. The mortgage was executed on 19th November, 1933 and the suit was filed in 1941. The interest provided in the document was 18 per cent. simple and in default of regular payment of interest year after year, compound interest was payable at the same rate at 18 per cent. The mortgagee was the first defendant's mother's sister's husband who, it is said, was living next door to the mother. The defence is that there was no consideration for the mortgage and that even otherwise it was not binding on the minor. The document recites that there were two prior promissory notes, under which the mother had borrowed Rs. 300 on 24th September, 1932 and Rs. 500 on 7th June, 1933, that a sum of Rs. 900 was found due on those two documents on the date of the mortgage, and that there was a further cash advance of Rs. 600 on that date. Undoubtedly, it is upon the mortgagee to prove the necessity for the debt The trial Court has found that there was no necessity and no consideration even and dismissed the suit. On appeal, the learned District Judge has taken the view that where the mother of a minor executes a mortgage, we must presume that it was for necessity as the mother would not act against her son's interest and has written several long paragraphs as to what he considers would be the natural conduct of a mother or of a father Then he refers to the observations of their Lordships of the Privy Council in *Hunoomanpersaud Panday* v. *Mst. Babooee Munraj Koonweree*[1], about the representations made by a guardian,

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* S. A. No. 2010 of 1944. 9th November, 1945.

1. (1856) 6 M.I.A. 393 at 418.

bona fide belief on the part of the lender and so on. Even in cases where the father or the mother of a minor executes a mortgage, there is no onus on the part of the minor to prove that the father or the mother was a reckless or careless person, or that there was ill-feeling between himself and the parent, or any other circumstances to justify an inference that the guardian was acting against the minor. I have not been referred to any authority which lays such a duty on the minor. Undoubtedly, it is the duty of a creditor who seeks a decree against the minor's estate to prove both consideration and actual necessity. In case where the lender is a stranger who may not know the circumstances of the family, representations made by the guardian may, in some cases, even without independent enquiries, be enough to support the transaction if the alienee acted *bona fide* and in good faith, *i e*, if he believed the representations of the guardian and if there was no call to make independent enquiries But here is a case of the mother's sister's husband who is said to have advanced all the monies—in 1932 a sum of Rs. 300 ; the very next year another sum of Rs 500 on 7th June, 1933 ; and within 5 1/2 months there is the mortgage with a further cash advance of Rs 600 It is admitted and indeed it is the case of the mortgagee that the minor's mother was living next door to him at Coimbatore looking after the education of her sons. This is not a case in which it can possibly be said that the alienee is a person who believed the representations of the guardian and in good faith acted upon such representations. He must have known all the circumstances of the family and it is ridiculous to say that the test to be applied to a *bona fide* alienee could be applied to this case. In this case he must prove both consideration and necessity I do not wish to deal with the case further as I am sending the case back for fresh disposal. The decree of the lower appellate Court is reversed and the appeal is sent back for proper disposal in the light of the observations made above The appellate Court will proceed upon the footing that the mortgagee cannot support his mortgage on the theory of being a *bona fide* lender and that he must prove actual necessity The fact that the mother was the guardian who executed the document is not a relevant consideration and there is no duty on the part of the minor to prove that there was ever ill-feeling between himself and his mother or that his mother was a reckless or careless person.

Court-fee paid on the memorandum of the second appeal shall be refunded. Other costs shall abide and be provided for in the revised decree of the lower appellate Court.

No leave.

V.S. *Appeal allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Paluru Ademma .. *Appellant**

v.

Achala Penchelu Reddi . *Respondent.*

Adverse possession—Acquisition of—Independent trespassers' possession cannot be tacked—Continuity of possession under some privity of title—Necessity—Privity of title—Meaning to be given.

The possession of independent trespassers cannot be tacked on for acquiring a title by adverse possession The possession must be continuous and it must be connected as of right, or under some privity of title The trespasser who claims adverse possession must not have gone into possession in defiance of the possession of the predecessor The man who pleads adverse possession must claim under or through his predecessor or predecessors It is only when these features exist or co-exist that the adverse possession of several people against the true owner could be tacked on

Where possession is traced to the possession of the previous trespasser and is not antagonistic, there is no reason why the necessary privity should not be postulated, which would enable the two periods of possession to be tacked Privity of estate or contract is a somewhat flexible term and must be given a rather comprehensive meaning when justice has to be done

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* S. A. No. 128 of 1945. 29th November, 1945.

Where a ridge between two fields has been used and enjoyed by the owners on both sides of it for quite a long number of years, the right of a person who has purchased a plot on one side of it and has been using the ridge for over nine years cannot be interfered with and destroyed, because of the technical rule that independent trespassers should not be allowed to tack on possession

Appeal against the decree of the Court of the Subordinate Judge, Nellore, in A S No. 39 of 1943 (A. S. No. 47 of 1943, District Court) preferred against the decree of the Court of the District Munsiff, Nellore, in O. S. No. 320 of 1941.

K Umamaheswaram for Appellant.

Ch Raghava Rao for Respondent.

The Court delivered the following

JUDGMENT.—The dispute in this second appeal preferred by the plaintiff relates to a ridge marked blue in the Commissioner's plan, Ex. D-1. It would be seen that it is situated between S No. 236/1, which belongs to the plaintiff and S. No 235/3, which belongs to the defendant. The learned Subordinate Judge has rightly found, on the basis of the evidence in the case supported by the Commissioner's reports and plans, that it is outside both the survey numbers. The plaintiff alleged that the ridge belonged in common to her and the defendant and she asked for a mandatory injunction that it should be restored to its original condition inasmuch as the same had been interfered with by the defendant by reducing its width as well as height She pleaded that the ridge was being enjoyed in common between the two neighbouring owners for quite a long time. The District Munsiff held that the plaintiff and the defendant were joint owners of the suit ridge and that the defendant interfered with it by reducing its height and breadth So he granted to the plaintiff a mandatory injunction. On appeal by the defendant, the learned Subordinate Judge of Nellore came to the conclusion that the ridge did not form part of Survey No 236/1, which the plaintiff purchased in Court auction in execution of the decree in O S. No 1322 of 1932 and that she could not, therefore, lay claim to a joint right in the ridge with the defendant Dealing with the question of the acquisition of a right by adverse possession, he held that though the judgment-debtor in O S No 1322 of 1932 was in possession previously and the plaintiff was in possession subsequent to the purchase, still no title could be made out on the basis of adverse possession, as it was a case of independent trespassers, the plaintiff not claiming title to the ridge by reason of the purchase of S. No 236/1 In paragraph 6 he says that he was prepared to accept the District Munsiff's finding that the plaintiff and her predecessors were enjoying the ridge and the grass grown thereon jointly with the defendant and his predecessors ; but states that as the plaintiff's purchase was only 9 years back, she could not get any title by adverse possession as her enjoyment fell short of the period of 12 years required by law. According to him, she could be considered only as a person claiming as an independent trespasser and her adverse possession could not be tacked on to the adverse possession of her judgment-debtor We have to see whether this conclusion is correct.

Whatever might have been said in *Willis* v *Earl Howe*[1], which was the decision referred to and followed in *Ramayya* v *Kotamma*[2] cited for the appellant, the law is clearly settled now, after the decision of the Privy Council in *Solling* v *Broughton*[3] that the possession of independent trespassers cannot be tacked on for acquiring a title by adverse possession. Whether any distinction should be made in this proposition as between a case falling under Article 142 and a case falling under Article 144 is a question that does not concern us now, though it must be said that it is somewhat difficult to see how even with reference to a suit to which Article 142 of the Limitation Act applies, the possession pleaded by the defendant could be regarded as continuous, if the persons who were in possession did not claim title under or through one another. The principle of *Solling* v *Broughton*[3] is shortly stated in *Secretary of State for India in Council* v. *Debendra Lal Khan*[4] in these words :

1. (1893) 2 Ch. 545.
2. (1921) 42 M.L.J. 319 I.L.R. 45 Mad. 370.
3. (1893) A C. 556
4. (1933) 66 M L J. 134 L.R. 61 I.A. 78 ; I.L.R. 61 Cal. 262 at 273 (P.C.).

"It is true that the periods of possession of a series of independent trespassers cannot be added together and utilised by the last possessor to make up the statutory total period of adverse possession *Dixon* v *Gayfere*[1]"

The possession must, therefore, be continuous In fact, it must be connected as of right, or under some privity of title. The man who pleads adverse possession must claim under or through his predecessor or predecessors It is only when these features exist or co-exist that the adverse possession of several people against the true owner could be tacked on.

Now, what are the facts before us ? The plaint alleges in paragraph 4, after referring to S No 236/1, and S No. 235/3 that both the parties and their predecessors-in-title have been enjoying in equal halves the ancient ridge lying between the two properties, of a width of 8 links and a height of 2½ feet, and that they were taking the grass, etc , on the ridge in the same manner. This allegation is quite consistent with the case that the ridge formed an appurtenance to S. No. 236/1. I am not able to see why the learned Subordinate Judge states in paragraph 5 of his judgment that the plaintiff has not claimed in the plaint any right to this ridge on this basis She claimed the half right in the ridge jointly with the defendant undoubtedly, but she did not say in the plaint that she got this half right because it was a ridge that demarcated the two properties, the owners of the adjoining survey numbers being each entitled to a half-share. This was one of the contentions put forward at the time of the trial and, as pointed out by the learned Subordinate Judge, was discussed by the learned District Munsiff in paragraph 17 of his judgment from which it appears that more than one case seem to have been advanced ; for instance, that a demarcating ridge, lying between two fields owned by different owners should be deemed to lie on either side of the exact dividing line of ownership and should, therefore, be presumed to be owned jointly Another case was, apart from any such presumption, the evidence was sufficient to hold that the plaintiff had acquired a joint right by possession The view taken by the lower Court that because this ridge did not form part of the purchase by the plaintiff in Court auction, as it falls outside S No. 236/1, which alone was bought by her, fails to take into account the probability that as the previous owner, *viz* , the judgment-debtor in that suit, was enjoying this ridge by reason of the ownership of S No. 236/1, any right that was acquired under the Court auction purchase must be deemed to have included the right to this ridge also as an appurtenance to this property.

What the law requires, as stated already, is that there should be some privity between the persons in possession, *i.e.*, the trespasser who claims adverse possession must not have gone into possession in defiance of the possession of the predecessor This is pointed out in the decision reported in *Ma Mi* v *Hadji Mahomed*[2], where we find this passage :

"The cases quoted in the lower Courts to the effect that one trespasser cannot tack the period occupied by the possession of another trespasser does not touch the real question in this case The trespassers in such cases would be independent trespassers and not the so called trespassers claiming to have purchased the one from the other In other words, each of the independent trespassers referred to in such cases would have entered in defiance of the rights of all previous trespassers."

In Wood on Limitation (4th edn., Vol. 2, page 1311) where the question of tacking is discussed at great length and with a wealth of citation of American decisions, it is laid down .

"In order to create the privity requisite to enable a subsequent occupant to tack to his possession that of a prior occupant, it is not necessary that there should be a conveyance in writing It is sufficient if it is shown that the prior occupant transferred his possession to him, even though by parol "

Cases are cited at page 1312 as authorities for the position that it is enough if we have a continuous and uninterrupted possession for the requisite period, whether by one or more persons, where such was the understanding of the parties. In Rustomji on Limitation, *Baijnath* v *Ram Bilas*,[3] is quoted as authority for the position that all

1. (1853) 17 Beav 421 51 E R. 1097
2 (1923) I.L R. 1 Rang. 176 · 75 I.C. 31
3. (1924) 80 I.C 12 (All)

that is necessary to privity between successive occupants of property is that one receives his possession from the other or by act of such other, or by operation of law.

The plaintiff in the present case did not commence his enjoyment of the ridge in a manner hostile to or derogatory of the rights of the judgment-debtor in the suit in execution of which S No 236/1, was purchased ; on the other hand, the possession was because his judgment-debtor was in enjoyment of this ridge, which lay adjacent to that survey number It may be said that the plaintiff got the right under the purchase, or at least, by reason of the purchase, though it is perfectly true that this ridge was not part of S No. 236/1 The position is really as if the judgment-debtor told the plaintiff, " You may enjoy the ridge as owner of S. No 236/1 as I have been doing heretofore " The possession and enjoyment of the ridge accompanied the ownership of the field I fail to understand why, in a case like this, where the possession is traced to the possession of the previous trespasser and is not antagonistic, we should not postulate the necessary privity, which will enable the two periods of possession to be tacked. Privity of estate or contract is a somewhat flexible term and must be given a rather comprehensive meaning when justice has to be done.. Here is a ridge that, according to both the Courts, has been used and enjoyed by the owners on both sides of it for quite a long number of years and now the plaintiff, who purchased the eastern survey number and has been using the ridge for 9 years, is to be told that she must allow her right to be interfered with and destroyed, because of the technical rule that independent trespassers should not be allowed to tack on possession. Law should not render itself so helpless.

I differ from the conclusion of the Subordinate Judge, and holding that the plaintiff has established her right to enjoyment to a half share in this ridge by adverse possession, set aside the decree of the lower Court and restore that of the Munsiff with costs right through.

No leave.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Muhammadhu Mamoona Labbai and others .. *Appellants**

v.

C. Ramanatha Pillai and others .. *Respondents.*

*Mortgage deed—Construction—*Othi*—Clause* "தொகையைக் கட்டி மீட்டுக்கொள்வேணுகவும்"—"*Pay the amount and redeem*"—*Amounts to a personal covenant to pay the* othi *amount enabling the mortgagee to bring a suit for sale*

A deed contained a covenant "you shall take possession of the schedule property under *othi* for a period of six years from this day, pay the assessment due to the Government, and enjoy the property. On the expiry of the stipulated period I shall pay the amount and redeem the *othi*" (தொகையைக் கட்டி மீட்டுக்கொள்வேணுகவும்)

Held, the words clearly denote a personal covenant to pay the amount, and enables the mortgagee to bring a suit for sale

Palaniappa Chettiar v *Periaswami Konar,* (1941) 2 M L J 447, distinguished *Udayana Pillai* v *Senthilvelu Pillai,* (1896) 6 M L J 210 I L R 19 Mad 411 and *Kangayya Gurukkal* v. *Kalimuthu Annavi,* (1903) 14 M L J 61 I L R 27 Mad 526 (F B), relied on

Appeal against the decree of the Court of the Subordinate Judge, Tinnevelly, in A. S. No. 15 of 1944, preferred against the decree of the Court of the District Munsiff, Srivaikuntam, in O. S No. 330 of 1940.

A. Swaminatha Aiyar for Appellants.

N. Krishnamachari for Respondents.

The Court delivered the following

JUDGMENT —The only point pressed for the appellants in this second appeal is that on a proper construction of the *othi* deed, Ex. P-18, there is no personal

* S. A. No. 1906 of 1944. 24th October, 1945.

covenant to pay the amount due under the deed to enable the plaintiff to bring a suit for sale. Mr. Swaminatha Aiyar for the appellants also raised another point that even if the deed did contain a personal covenant to pay, the suit for sale is not maintainable because after the amendments to sections 67 and 98 of the Transfer of Property Act the mortgage in question should be treated as an anomalous mortgage and if the deed itself did not confer a right on the mortgagee to institute a suit for sale he will not have that right This point was not raised in either of the Courts below It assumes that the amendments referred to are retrospective and will affect rights under a mortgage of 1922. In the absence of authority I am not inclined to agree with the appellants' Counsel that these amendments are retrospective. But I shall not express any final opinion because I do not think I should permit the appellants to raise this point, not having raised it in the Courts below

The relevant part of the document in question is as follows in the translation by this Court :

"You shall, for this sum of rupees four thousand two hundred and fifty, take possession of the schedule property under *othi* for a period of six years from this day, pay the assessment due to the Government, and enjoy the property On the expiry of the stipulated period, I shall pay the amount and redeem the *othi* "

As Mr Swaminatha Iyer for the appellants has taken objection to the correctness of this translation, I am also setting out the original Tamil which is as follows :

"நாலாயிரதது இரு நூற்று அன்பதுக்கும் தபசில் சொத்தை இது முதல் ஷு. 6 ஆருக்கு ஒத்தியாக (இராஙகி) சாக்கார தீர்வையும் தாஙகளே செலுத்தி அனுபவித்துக் கொளளவேண்டியது சஙகை கழித்து தொகையை கட்டி ஒததியை மீட்டுக் கொளவே ஞகவும்."

Both the lower Courts have held on a consideration of the actual language used and with the assistance of the decisions in which similar language had been used that there is a personal covenant to pay the othi amount.

It is contended that the relevant words which in the translation appear as " I shall pay the amount and redeem the othi " really ought to have run as " having paid the amount, I shall redeem the othi." The contention is that this provision is only for redemption on payment and does not import an obligation to pay. Great stress is also laid by Mr Swaminatha Aiyar on the fact that according to him there is no date mentioned for payment. He sought to distinguish in particular the decision of the Full Bench in *Kangayya Gurukkal* v *Kalimuthu Annavi*[1], on the ground that in the document construed in that case a definite date had been mentioned. I do not agree however that there is no date mentioned in Ex. P-18 for payment. The sentence preceding does fix a period of six years " from this day " that is, the date of the document In *Udayana Pillai* v *Senthilvelu Pillai*[2], a Bench of this Court construed almost identical language to imply a covenant to repay the mortgage amount on a certain date In that case the contract between the parties contained in a deed dated the 8th October, 1867, provided as follows :

" In lieu of interest on this sum of Rs 200 you will, for three years from this year, raise any crops you like, including summer and season crops, pay Government assessment and enjoy the said lands. On the expiry of the term, I shall pay the said Rs 200 and redeem the lands "

Their Lordships held that these words contained a covenant to repay the mortgage money on a certain date, that is the 8th October, 1870 This date, it may be remarked, is not to be found in the document. It is a date which has to be necessarily implied by the language used, namely, " on the expiry of the term" Likewise in the present document it can be implied that the date fixed for payment is the 16th September, 1938.

I entirely agree with the Courts below in holding that the construction of this document should follow the construction of documents containing very similar language in *Kangayya Gurukkal* v. *Kalimuthu Annavi*[1], and *Udayanan Pillai* v. *Senthilvelu Pillai*[2].

1. (1903) 14 M L.J 61 : I L R 27 Mad. 526. (F.B.).
2. (1896) 6 M.L J. 210 : I.L.R. 19 Mad. 411

Mr. Swaminatha Aiyar for the appellant relied strongly on the recent ruling of a Bench of this Court in *Palaniappa Chettiar* v. *Periaswami Konar*[1], The document construed in that case contained the following clause·

"In any year, after the expiry of the stipulated period, I shall redeem by giving notice in *Panguni* and paying money in *Chitrai*"

Their Lordships held that there was no covenant to pay Two features which distinguish the language used in the document construed in that case from the language used in the document in the present case may be noted. The first is that there is an option to pay *in any year*, and secondly the main idea of the clause is that the mortgagor is at liberty to redeem after the expiry of the stipulated period, and as a condition of redemption the issue of notice in a particular month and payment in another month are specified Krishnaswami Aiyangar, J, in delivering the judgment says at page 449

"There are no words in the deed casting an obligation on the mortgagor to pay and redeem, capable of being enforced at the instance of the mortgagee The language employed only reserves an option to the mortgagor, but if he desires to exercise it, he can do so only by following the procedure indicated, and not otherwise"

I do not think that the decision in that case helps us to construe Ex. P-18. The language used in the document in the other decisions relied on by the appellants, namely, *Rangayya Pillai* v *Narasimha Aiyangar*[2], *Damodara* v *Chandappa Pujary*[3], and *Mohamed Naina Thambi Marakayar* v. *Sidhi Mohamad*[4], is so different from the language used in the present case that I need not deal with them in detail. In this case the words "தொகையைக் கட்டி" and "மீட்டுக்கொளவேணுகவும்" clearly denote a covenant to pay and the lower Courts are correct in the view that they took of the document.

The second appeal is therefore dismissed with costs of the first respondent. No leave

K S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AIYAR

Jonnada Sayi and others *Appellants**

v

Jonnada Subbanna and others *Respondents*

Transfer of Property Act (IV of 1882), sections 53-A and 105—Doctrine of part performance—Applicability to leases—Deed—Construction—Letter evidencing arrangement for enjoyment of lands—Whether amounts to lease.

Section 53-A of the Transfer of Property Act applies also to leases of immoveable property

Shyam Sundar Lal v *Din Shah*, I L R 1937 All 312, relied on

Where the first plaintiff had put the defendants in possession of certain washerman service inam lands and the letter evidencing the arrangement provided that the defendants should enjoy the lands during the lifetime of the first plaintiff subject to their rendering the village services on her behalf and also giving her a half share in the produce or rent,

Held, that the letter evidenced a lease within the meaning of section 105 of the Transfer of Property Act

Appeal against the decree of the District Court, East Godavari, in A S. No. 242 of 1943, preferred against the decree of the Court of the District Munsiff, Rajahmundry, in O S. No 156 of 1942

N. Bapiraju for Appellants.

K. Subba Rao for Respondents.

The Court delivered the following

JUDGMENT.—The suit was brought by the plaintiffs to recover possession of certain properties described as washerman service inam lands on the allegation

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1. (1941) 2 M L J. 447.
2. (1918) M W N 672
3. (1933) 65 M L J. 194: I.L.R 56 Mad. 892
4. 1937 M.W.N. 81.

* S. A. No. 565 of 1945. 20th November, 1945.

that they belonged to the first plaintiff and were given on lease to the second plaintiff under Ex P-1 on the 10th March, 1941, and that the defendants trespassed into the lands on 29th April, 1941 Certain very material facts which have been found to be true were suppressed by the plaintiffs. The first plaintiff had put the defendants in posession of the properties under arrangement evidenced by a letter marked as Ex. D-1, dated 3rd January, 1932 Under this arrangement they were to have possession of the lands belonging to her, rendering village service as per mamool and giving her a half share in the produce. In case, the lands were given on lease they were to give her a half share of the rent received The arrangement was to enure for her life and possession was delivered to the defendants under the arrangement. The second plaintiff took a lease of the lands from the defendants and the first plaintiff on 8th June, 1937, for a period of four years under Ex D-2. The lease expired on 27th March, 1941 It was after this that the first plaintiff is said to have granted a lease in favour of the second plaintiff under Ex P-1 on 10th March, 1941

Both the lower Courts which dismissed the plaintiffs' suit have found that the defendants were not trespassers and that the lease which the first plaintiff granted in favour of the second plaintiff could not prevail against their rights under Ex. D-1. They have held that even though Ex. D-1 is unregistered, the doctrine of part performance enunciated in section 53-A of the Transfer of Property Act applied to the case.

Two points have been argued on behalf of the appellants. One is that the defendants must be treated as trespassers because the lease under Ex. D-2 expired on 27th March, 1941, and the second plaintiff got a lease in his favour from the first plaintiff on 10th March, 1941 This argument overlooks the fact that the arrangement under Ex. D-1 was not terminated, and could not be because, as stated already, it is to enure during the period of the first plaintiff's life. So the possession which the defendants have is referable to Ex. D-1, not having anything, to do with any trespass into the property on 29th April 1941 or on any other date. It is true that the first plaintiff expressed her intention to throw the arrangement evidenced by Ex D-1 overboard by granting a lease in favour of the second plaintiff, but this surely does not bind the defendants who have got rights under Ex. D-1.

The second point taken on behalf of the appellants is based on the observation of the Privy Council in *S N Banerji* v *Kuchwar Lime and Stone Co., Ltd* [1], that it is possible that the doctrine of part performance does not apply to transfers of partial interests in immovable property A fleeting doubt was expressed in this decision on the question and was not followed up by any reasoning, for it was unnecessary for their Lordships to decide any such point The partial interest which they referred to in that case was not a lease but an interest to go upon property for the purpose of cutting timber or digging mines, which without anything further can only be regarded as a license, which was the case dealt with in *Traders and Miners, Ld* v. *Dhirendranath Banerji*[2]. That section 53-A of the Transfer of property Act applies to leases has been held in quite a number of cases and one of them is the decision of Sulaiman, C J, and Bennett, J, in *Shyam Sundar Lal* v *Din Shah*[3]. There, the learned Judges point out that though section 53-A speaks of a transfer of immoveable property and section 105 describes a lease as a transfer of a right to enjoy immoveable property, leases really amount to transfers of property within the meaning of Chapter II of the Act and a transfer by way of a lease is also governed by section 53-A. The only argument that Mr. Bapiraju could urge in this connection is that Ex. D-1 is not a lease at all because the right to enjoy the property could not be said to have been transferred in the face of the provision in the latter that the plaintiff was to get a half share in the produce and was liable for a half share of the tax payable and moreover she was also a party to the lease under Ex. D-2 Ex. D-1, however, refers to the fact that possession of the lands had been handed over to the defendants and that they were to enjoy such possession during the term of her life

1 (1942) 1 M L J 1 I L R. 21 Pat 243 (P C) 2 (1943) I L R 23 Pat 115
3 I L R 1937 All. 312

rendering village services on her behalf also and giving her a half share in the produce or rent. The half share in the produce is the rent that she was to get and there is no room for doubt that the letter evidences a lease within the meaning of section 105 of the Transfer of Property Act, which contemplates share of the produce or service or any other thing of value being rent.

The second appeal is dismissed with costs. No leave.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Puthenveettil Thalasseri Veettil Ammu Amma and others .. *Appellants**

v.

Chelakuttiyil Kunnapadi Kalan, Karnavan and manager of his tavazhi and another .. *Respondents.*

Malabar Tenancy Act (XIV of 1930), *section* 20 (5) *and* (3)—*Claim for eviction under clause* (5) *of section* 20—*Onus—Failure of landlord to make out claim for eviction under clause* (5)—*Landlord cannot fall back on clause* (3)

Where beyond a recital in the plaint and a statement in the evidence of the kariasthan who ceased to be a kariasthan 15 years prior to the suit, there was no attempt at proving that the holding is required *bona fide* for the cultivation of the landlord or a member of his tarwad or tavazhi, but the plaintiffs relied upon a statement of the 1st defendant that it would be convenient for the plaintiffs to look after the plaint property if they recovered possession of it,

Held, that as the onus thrown on the landlord by clause (5) of section 20 of the Act of proving affirmatively, that the holding is required *bona fide* for his own cultivation has not been discharged and as the test of convenience is not the one prescribed by law, the plaintiffs had not established sufficient grounds for evicting the defendants

Where in a case falling within the category of cases covered by clause (5) of section 20, one of the requirements of that section is not satisfied, it is obviously not open to the party to claim eviction by falling back upon clause (3) as it is repugnant to the scheme of the Act as well as section 20.

Appeal against the decree of the District Court, North Malabar, in A. S. No. 133 of 1944, preferred against the decree of the Court of the Principal District Munsiff, Tellicherry, in O. S. No. 562 of 1942.

A. Achuthan Nambiar for Appellants.

M. Chinnappan Nayar and *N. Narayana Unni* for Respondents.

The Court delivered the following

JUDGMENT.—The short question involved in this appeal is whether the plaintiffs who are the appellants have established sufficient grounds for evicting the respondents from the suit property. That in turn depends upon the question whether the plaintiffs required the holding *bona fide* for their own cultivation or for that of any member of their family or tarwad or tavazhi who had a proprietary and beneficial interest in it The learned District Judge after going into the evidence and the attendant circumstances found that the claim for eviction had not been substantiated. This finding is now attacked as being incorrect. As a finding of fact it is not open to the appellants to canvass it before the second appellate Court. It is therefore urged that the finding is not supported by any evidence whatsoever. The provisions of clause (5) of section 20 of the Malabar Tenancy Act of 1929 would seem to throw upon the landlord the onus of proving affirmatively that the holding is required *bona fide* for his own cultivation, *etc.* In the present case, beyond a recital in the plaint and a statement in the evidence of the kariasthan, there was no attempt at proving the aforesaid *bona fide* requirement. The recital in the plaint has been rightly held by the District Judge as not amounting to evidence. The kariasthan had hardly any competency to speak as he ceased to be the kariasthan fifteen years ago and all that he stated was that the plaintiffs wanted the plaint property to be in their possession since the rents were in arrears. That obviously is not the *sine qua non* required under the statute. Having failed to discharge the

* S. A. No. 2368 of 1944. 10th December, 1945.

burden cast upon them by the law, the appellants tried to rely upon the stray statement in the evidence of the first defendant that it would be convenient for the plaintiffs to look after the plaint property if they recovered possession of it. As observed by the District Judge, the test of convenience is not the one that the law has prescribed. What has to be proved is that the holding is actually required for cultivation by the family itself *bona fide* There is no evidence either of its being required for cultivation by the family or of its being so required *bona fide*. The District Judge was right in holding that the claim for eviction had not been substantiated by the plaintiffs. This discussion is with reference to section 20, clause (5) of the Act, as it stands this day, although it would appear that this clause has been substantially amended by an amending Act which is awaiting publication.

It is argued by the learned advocate for the appellants that they are entitled to maintain the claim for eviction under clause (3) of section 20 even if they fail under clause (5). This contention was not advanced in any of the Courts below; nor was it raised specifically in the memorandum of appeal here. There is no merit in the contention either. Where it is a case falling within the category of cases covered by clause (5) and where one of the requirements of that section is not satisfied, it is obviously not open to the party to fall back upon clause (3), as if that could be done, in every case where the landlord failed to prove that he required the holding *bona fide* for his own cultivation, he could contend that clause (3) would come to his aid and that he was entitled to evict the tenant. That obviously is repugnant to the entire scheme of the Act as well as of section 20.

The next point argued is about the deposit. The finding of the learned District Judge on that matter is also a pure finding of fact and I see no reason to interfere.

The appeal is dismissed with costs. (Leave refused).

V.P.S. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR JUSTICE KUPPUSWAMI AIYAR.

A Pleader *In re*.*

Legal Practitioners' Act (XVIII of 1879), section 13—Pleader—Conviction for defamation of Sub-Inspector of Police—Offence involves moral turpitude—Suspension from practice not warranted—Reprimand sufficient.

A pleader defamed a Sub-Inspector of Police and was prosecuted and convicted in respect of it On a question as to his conduct and the nature of the disciplinary action justified by the circumstances of the case,

Held, that the offence which the pleader committed certainly does involve moral turpitude He is a member of the legal profession and it was wrong of him to defame the Sub-Inspector of Police in the way he did But his action does not involve such a degree of moral turpitude as to warrant the Court in imposing the severe penalty of suspension from practice and a reprimand would be sufficient in the circumstances

The Advocate-General (*K. Rajah Aiyar*) in support of the Notice.

K. P Mahadeva Aiyar for the Pleader.

The Judgment of the Court was delivered by

The Chief Justice.—The respondent is a pleader practising at Coonoor. On the 6th February, 1944, a Badaga made a complaint to the Kotagiri Police against another Badaga in respect of an offence alleged to have been committed within the meaning of section 324 of the Indian Penal Code. The case was investigated by the Sub-Inspector of Police who referred it as undetectable The complainant then engaged the respondent to file a complaint before the Sub-Magistrate of Coonoor. While the respondent was waiting in the Court for the Magistrate to take up the case, the Additional Assistant Public Prosecutor asked him why he had come to Court. The respondent said that the Sub-Inspector had taken money

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* R. C. No. 34 of 1945. 3rd December, 1945.

from the other side and referred the case as undetectable and that the Sub-Inspector would have referred it as false if he had been paid an extra Rs 50 This statement was, of course, defamatory of the Sub-Inspector and it resulted in a prosecution for defamation . The respondent was fined by the trial Court Rs 1000 and ordered to undergo six months' rigorous imprisonment in default of payment On appeal the fine was reduced to Rs 200 with the alternative of one month's simple imprisonment

In these circumstances, the High Court directed the District Judge of Coimbatore to enquire into the matter under section 13 of the Legal Practitioners' Act. The respondent was called upon to file a written statement and he did so, whereupon a charge for professional misconduct was framed against him The learned District Judge found him guilty of the charge and in his report to this Court has suggested that the degree of moral turpitude involved warrants the suspension of his sanad, not permanently, but for a period.

The Privy Council in *Advocate-General, Bombay* v. *Phiroz Rustomji*,[1] held that the conviction of an advocate or a pleader of a criminal offence is evidence of the misconduct within the meaning of section 10 of the Bar Councils Act, and it is for the Court to consider whether the disciplinary action called for should be in the nature of a reprimand, suspension or removal from practice. The offence which the respondent committed certainly does involve moral turpitude He is a member of the legal profession and it was wrong of him to defame the Sub-Inspector in the way he did At the same time, we consider that his action does not involve such a degree of moral turpitude as to warrant the Court in imposing the severe penalty of suspension from practice We think that the case may be dismissed with a reprimand

V S.

Case dismissed

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI

K. AR. S T Arunachalam Chettiar . *Applicant**

v.

The Commissioner of Income-tax, Madras. *Respondent.*

Income-tax Act (XI of 1922), *section* 10 (1)—*Plantations received by assessee on division treated as capital of new money-lending business—Profits on sale of plantation—Liable to income-tax*

On his decision to retire from his business, a Hindu father divided his assets at Bhattu Pahat in Malaya between his two sons who had already separated from him and were carrying on separate money-lending businesses in Burma The assessee received a rubber plantation and a cocoanut plantation in Bhattu Pahat and a half share in the assets of the father's money-lending business there He started a money-lending business at Bhattu Pahat and he entered in the books of account of that business the values of the two plantations which had been given to him They were treated as being part of the capital of the money-lending business In these accounts the expenses of running the estate were debited and the profits accruing therefrom were entered as profits of the money-lending business In the year of account, the assessee sold a portion of the rubber plantation and entered the sale proceeds in the accounts of his business The sale showed a profit On a question whether in the circumstances of the case, such profit was liable to income-tax

Held, that the plantation formed part of the assessee's capital of his money-lending business and profits made on the sale in question was included in the profits of the business and as such was liable to income-tax

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in application 66, R. A No. 39 (Madras) of 1943-44 on its file relating to year of assessment 1941-42, for decision on the following question of law namely

"Whether in the circumstances of this case, the profit arising on sale of the property was liable to income-tax "

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1 (1935) 69 M.L J 431 : L.R 62 I A. 235 : I L R. 59 Bom. 676 (P.C)

*R. C-No 29 of 1944. 9th November, 1945.

M Subbaraya Aiyar for Applicant.

C. S Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

The Chief Justice—For the purpose of deciding the question referred in this case we think it necessary to know whether the expenses of the rubber plantations were debited to the assessee's money-lending business and whether the income from the plantations was brought in as part of the profits of that business. In these circumstances we refer the case back to the Income-tax Appellate Tribunal under the provisions of section 66 (4) for a statement of the facts.

The reference will stand adjourned until this further statement has been received.

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After the return of statement of facts, the judgment of the Court was delivered by

The Chief Justice—The Income-tax Appellate Tribunal has submitted the further statement of facts called for by this Court in its order of the 2nd March, 1945 The facts are now clear and they may be stated shortly as follows :

The assessee, his father and his brother Narayanan Chettiar constituted an undivided Hindu family, but partition was effected in 1925. Before the separation the family had carried on a money-lending business in partnership with another person at Bhattu Pahat in Malaya Under the terms of the separation the entire assets of the money-lending business at Bhattu Pahat fell to the father's share. The sons then started separate money-lending businesses of their own in Burma. In 1939, the father decided to retire from business In addition to the assets of the money-lending business at Bhattu Pahat, he was possessed of certain rubber and cocoanut plantations. After reserving for himself sufficient to live upon, he divided the rest of his assets between his two sons Each of them received a rubber plantation and a cocoanut plantation at Bhattu Pahat in addition to equal shares in the assets of the money-lending business. Thereupon each of them started a money-lending business at Bhattu Pahat The assessee entered in the books of account of his money-lending business the values of the two plantations which had been given to him They were treated as being part of the capital of the money-lending business In these accounts the expenses of running the estate were debited and the profits accruing therefrom were entered as profits of the money-lending business. In the year of account the assessee sold a portion of the rubber plantation and entered the sale proceeds in the accounts of his business The sale showed a profit. The question in this case is whether this profit was liable to income-tax. The tribunal held that it was but referred to this Court for decision the following question :

" Whether in the circumstances of this case, the profit arising on sale of the property was liable to income tax "

We consider that the decision of the tribunal was clearly right The plantations formed part of the asesssee's capital of his money-lending business and the profit made on the sale of a part of the rubber plantation was included in the profits of the business. We answer the question referred in the affirmative

The assessee must pay the costs of the Commissioner, Rs. 250.

V S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT .—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE KOMAN.

Srinivasagam Asari and another *Appellants**

v.

Chinnammal and another . *Respondents.*

Will—Construction—Dedication for religious and charitable purposes—Provision for conduct of pooja and utsavam—Property not conveyed specifically to trustees—Effect—Joint family properties—Dedication by father—Concurrence by son being sole surviving coparcener—Validity of dedication.

A Hindu testator provided by his will that out of his properties certain sums should be paid to his son and daughter-in-law for their maintenance and also provided for the performance of certain

* Appeals Nos. 113 and 436 of 1944. 14th November, 1945.

pooja and utsavams in named temples. Then it provided as follows: "After deducting the expenses for the aforesaid charities, etc., and the amount required for free distribution of food for our kinsmen on the Dwadasi day . . , the balance shall be constituted as a fund for the benefit of the said charities and the same shall be conducted in a befitting manner The aforesaid persons or my other pangalis shall have no right to alienate the aforesaid properties in any manner If by mistake any sale, hypothecation, etc , are created, they are not valid In case my son aforesaid or his heirs or my daughter-in-law fail to conduct the above charities from the income aforesaid, one of the under-mentioned executors appointed by me shall conduct the aforesaid charities at the proper times . From the properties and income mentioned herein the charities shall be conducted excluding the expenses for carrying out the charities and the debit and credit expenses of my family as per the terms aforesaid, the balance of the income shall be constituted, as a fund for charity Neither my son, nor my daughter-in-law, nor the executors nor the heirs of the said persons shall have any right to utilise the properties set out herein and the balance of the income for their own private purposes in any manner" In a suit by a daughter of the testator claiming the estate as the heir of her brother on the basis that the will was invalid, it was shown that the properties dealt with under the will were the joint family properties and not the self-acquired properties of the testator It was at the same time established that the son and daughter-in-law took possession of the properties in pursuance of the will, that they accepted office as trustees and carried out the directions of the will with regard to the trusts created thereby.

Held, that the will operated as a valid dedication of the properties named in it for charitable uses and not merely to create charges in favour of the charities and that the absence of words expressly vesting the properties in the trustees as such was immaterial in view of the intentions of the testator as gathered from looking at the document as a whole

Held further, that inasmuch as the son of the testator who was then the sole surviving coparcener had concurred in carrying out the directions in the will the objection on the ground that the testator had no power to dedicate joint family properties was unsustainable, and that persons claiming through the son could not impeach the dedication

Appeal against the decree of the Court of the Subordinate Judge of Madura in O S. No. 15 of 1943 (O S No. 197 of 1942, on the file of the Court of the District Munsiff of Madura Town).

Appeal No. 113 of 1944

K S Ramamurthi for Appellants.

P. N Appuswami and *C D. Venkataramanan* for Respondents.

Appeal No 436 of 1944.

K V Srinivasa Iyar for Appellants

P. N Appuswami and *V Ramaswami Aiyar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice—In these appeals the Court is called upon to decide the effect of the will of one Sundaram, who died in the month of July 1933 The testator had two sons, Shanmugam and Sethuraman, and a daughter, the plaintiff in the two suits which have given rise to the appeals Shanmugam predeceased his father He left a widow Swarnavalli, but no issue Sethuraman died on the 23rd February, 1936 and Swarnavalli in March, 1940 Sundaram executed a will dated the 29th January, 1933, in which he purported to leave for charitable purposes the net income of the properties described in the document, after deducting certain sums for the maintenance of his son Sethuraman and his daughter-in-law Swarnavalli The properties were described by the testator as being his own. One of the questions in the appeals is whether the properties belonged to the joint family. Another question is, assuming that the testator had the right to dispose of the properties by a will, whether the directions amounted to a dedication to charitable uses or merely created a charge for such uses It is quite clear that the testator intended that Sethuraman and Swarnavalli should act as trustees of the charities mentioned in the will, and that they did so act has been found as a fact. It is also said on behalf of the appellants that even if the properties belonged to the joint family, as the Subordinate Judge has found, the plaintiff is not in a position to challenge the validity of the endowments as Sethuraman accepted as being valid the provisions of the will and acted as a trustee of the charities named therein

In O S. No 90 of 1942, filed on the 18th November, 1942, namely, two years and eight months after the death of Swarnavalli, the plaintiff claimed the estate as the heir of her brother on the basis that the will was invalid. She averred that her father had torn up the will. This allegation was entirely false and it is now accepted on her behalf that her father did leave the will relied upon by the defendants

and that it was executed by him when in full possession of his faculties. In this suit the plaintiff sought to set aside certain alienations of properties covered by the will for which Swarnavalli was responsible when she was acting as the sole trustee of the charities declared in the will after her husband's death. Appeal No 113 of 1944 is from the decree passed in O S No 90 of 1942. The appellants are the fifth and sixth defendants, who are two of the alienees.

The plaintiff filed O. S. No 15 of 1943 to recover another lot of property alleged by her to belong to her father's estate. It was in the possession of the second defendant, who claimed to be a usufructuary mortgagee of it The mortgage had been created by Swarnavalli after her husband's death and the plaintiff said that it was invalid. The suit was decreed and Appeal No. 436 of 1944 is the result.

The two suits were dealt with in a common judgment. The appeals can also be dealt with together.

The Subordinate Judge's findings may be summarised as follows · (1) The will set up by the defendants had been executed by Sundaram when in a sound disposing state of mind and it had not been revoked ; (2) the will was invalid because the properties disposed of by it were not the separate properties of the testator, but belonged to the joint family ; (3) assuming the will to be binding on the plaintiff, it merely created a charge in favour of the charities mentioned in it ; (4) Swarnavalli had no title to any of the properties left by her father-in-law and therefore conveyed no title to the alienees ; (5) the alienees were not *bona fide* purchasers or mortgagees, as the case might be, as they had not made proper inquiries with regard to the title of Swarnavalli to convey or mortgage ; and (6) the alienations were not binding on the plaintiff who was entitled to a decree for possession as the heir of her deceased brother Sethuraman.

In the first place we will deal with the question whether the properties covered by the will belonged to the testator in his own right or whether they belonged to the joint family The testator was a carpenter and as such did not earn more than Rs. 1-8-0 per diem His father was one Nallaperumal, who died many years ago. Nallaperumal had another son, Ramalingam. When Nallaperumal died he left property which became ancestral property in the hands of his sons In 1903, the sons decided to separate. The moveable properties of the joint family were partitioned in that year Sundaram's share of these properties amounted to Rs. 3,500, represented by debts due to the joint family In 1906, the immoveable properties were partitioned and to Sundaram was allotted property valued in the deed of partition at Rs 1,200 The learned Subordinate Judge says that this was probably an under-valuation While we can well believe this to be the case, we will assume that it was its true value Therefore, by 1906 Sundaram became the owner of what was ancestral property to the value of Rs 4,700 Admittedly he carried on a money-lending business. He could only have carried on this business with what he had received in the partition with his brother Certainly his earnings as a carpenter would not have been sufficient to provide the capital for a money-lending business. He was obviously of a thrifty nature In addition to money-lending he conducted chit funds in his own name, but here again the capital required for them could only have come from the nucleus of the ancestral properties and what he had made out of them. It was not until 1917 that he was in a position to buy the first of the immoveable properties which stood in his name at the time of his death. The value of these properties was some Rs. 38,000 The Subordinate Judge has held that they must have been acquired out of the nucleus of the ancestral properties which fell to Sundaram's share in the partition with his brother. With this opinion we are in full agreement. He had no capital apart from that which came to him in 1903 and 1906. The ancestral properties which he received in these years provided a sufficient nucleus for the acquisition in the course of years of the properties in suit and therefore the burden of proving that they belonged to the testator in his own right lay upon the appellants. They have certainly not discharged the burden.

This being the position the testator could not by his will dedicate the properties to charitable uses, but if it was his intention and properly expressed, his son's concurrence therein would alter the position. The principle stated by the Privy Council in *Purmanundass Jeevundass* v. *Venayekrao Wassoodeo*[1] would in such circumstances apply and effect would have to be given to the will In that case a Hindu testator made a bequest for charitable uses. His nephew, the son of a deceased brother, who was entitled either as his heir or as legatee to the residue of his estate, claimed that the only property which the testator died in possession of constituted joint family property and that under the Mitakshara law the testator had no power to dispose of it as he had purported to do. A specific portion of the testator's estate had been set apart as applicable to the trust for the charitable purposes declared by the will The nephew who had received the residue of the estate agreed with the executors that he would act jointly with them in carrying out the trust In fact he acted as a trustee of the charity It was held by the Judicial Committee that in these circumstances there had been a valid dedication of the property to charity It did not matter whether the will alone was sufficient for the purpose The fact that the nephew had accepted the dedication and had become a trustee of the charity was sufficient to give effect to the testator's intentions. Their Lordships said that they were not disposed to express any opinion on the question whether the testator had such ownership in the estate as entitled him to make a dedication They considered that if it were held that the power of the testator was doubtful, or even that it did not exist, the case must still turn upon the effect of the transactions which had taken place since his death. The transactions included the acceptance by the nephew of the will, his acquiescence in the transfer of the money set apart for the charity and his acceptance of the office of trustee. Therefore, if Sethuraman accepted his father's directions and treated the properties as being vested in him and his sister-in-law as the trustees of the charities, it will not be open to the plaintiff, who merely stands in his shoes, to take up a different position As the surviving coparcener Sethuraman became the absolute owner of the family estate.

Now what are the facts in this connection ? In paragraph 13 of his written statement the fifth defendant averred that after Sundaram's death Sethuraman and Swarnavalli took possession of the properties in pursuance of the will and that they accepted office as trustees and carried out the directions of the will with regard to the trusts created thereby The plaintiff filed a written statement in reply, but she did not traverse these allegations. The learned Subordinate Judge has found that on the death of Sundaram, Sethuraman and Swarnavalli acted in conformity with the testator's directions There is ample oral evidence to support this finding. In fact the witnesses who deposed to this fact were not cross-examined on the point. Moreover, the witnesses for the defence gave evidence first and when it came to the plaintiff's turn she did not deny the truth of what they had stated Therefore, we agree with the finding that Sethuraman accepted the will as constituting a valid dedication of the properties to charitable uses and that he acted as a trustee of the charities The effect of Sethuraman's acquiescence was not discussed in the trial Court, but the point is raised in the memorandum of appeal and we have allowed it to be argued because the plaintiff has had ample notice of it.

We will now turn to the provisions of the will. The testator directed that out of the properties Rs. 150 a year should be paid to Sethuraman for his maintenance and Rs. 84 a year to Swarnavalli for her maintenance. Each was allotted a house to live in for life, but the houses were not bequeathed to them The main provisions of the will are as follows :

"Just as I am conducting the pooja, etc , on the first day of the Navarathri golu festival (an annual festival for nine days when dolls, toys, etc , are exhibited) incurring an expenditure of Rs 25 in the Kamakshi Amman temple belonging to our kinsmen, situated in South Masi Street, Madura, in future also the said puja, etc , shall be continued according to the same mamool In addition, the pooja, etc , conducted by me on the first Somavaram (Monday) of the month of Karthigai every

1. (1882) L R. 9 I A 86 : I L R 7 Bom 19 (P.C.).

year, spending up to a sum of Rs 25 in Periya Nayanar Swamy Temple situated on the northern row of Eluthanikara Street, Madura, who is our family deity, shall be continued by me properly hereafter in the same manner Further, during the Panguni festival in the temple of Sri Sakshath Sivasubramania deity of Tiruparangundram, the Thirukan Sathukal, etc, (halting and worshipping the deity in a place during a procession) in the building bearing No 9 which belongs to me by right of purchase, for a period of nine days spending up to a sum of Rs 9 and the feeding of our kinsmen and the pilgrims on the tenth day, namely, Thirukalyanam day conducted by me as usual every year spending up to Rs. 41 shall be continued by me in future also in the same manner . After deducting the expenses for the aforesaid charities, etc, and the amount required for Annasanthi Samarathanai (free distribution of food) for our kinsmen on the Dwadasi day, i e, the day next to Vaikunta Ekadasi day every year conducted in house No 27 where my son Sethuraman Achari is residing spending nearly a sum of Rs 25, the balance shall be constituted as a fund for the benefit of the said charities and the said charities shall be conducted in a befitting manner The aforesaid persons or my other pangalis shall have no right to alienate the aforesaid properties in any manner If by mistake any sale, hypothecation, etc, are created they are not valid In case my son aforesaid or his heirs or my daughter-in-law fail to conduct the above charities from the income aforesaid, Sankaralingam Achari, one of the under-mentioned executors appointed by me, shall conduct the aforesaid charities at the proper times and shall maintain a detailed account in respect of the incomes, produce and the interest income and other incomes and expenditures relating to the charities . . From the properties and incomes mentioned herein the charities shall be conducted and excluding the expenses for carrying out the charities and the debit and credit expenses of my family as per the terms aforesaid, the balance of the income shall be constituted as a fund for charity Neither my son Sethuraman Achari, nor my daughter-in-law Swarnavalli Ammal, nor the executors, nor the heirs of the said persons shall have any right to utilise the properties set out herein and the balance of the incomes for their own private purposes in any manner . . . . Even if any of the properties belonging to me has been omitted to be mentioned herein, this will shall be binding upon the same"

The learned advocate for the plaintiff has not suggested that the charities mentioned in the will cannot be the subject of lawful endowment All that is said is that if Sethuraman's concurrence in the testator's directions makes the will valid, it merely operates to create charges in favour of the various charities, because there are no words expressly vesting the properties in Sethuraman and Swarnavalli as trustees It is true that the will does not contain a direct statement that the properties shall vest in the trustees, but we have to look at the document as a whole and in that way gather what were the testator's intentions. There can be no doubt that the testator intended the properties to devolve on his son and daughter-in-law as trustees for the charities named. There is no other conclusion open when the following directions in the will are borne in mind, namely, (1) If his son and daughter-in-law were not prepared to conduct the charities in accordance with his directions, then one of the three executors named in the will should carry out these duties ; (2) the properties mentioned in the will should not be sold ; and (3) the income was to be devoted to the charities named by him and the balance should "be constituted as a fund for charity".

In *Srinibash Das* v *Monmohini Dasi*[1], the Calcutta High Court was called upon to construe a will of a Hindu testator which provided for certain legacies and then directed that the rest of his estate was to be dedicated to his family idol. In six clauses which followed he made provision for the maintenance out of the income of the estate of his wife and other relations, for the marriage of his daughters and for their residence and maintenance. Finally in clause 10 it was provided that the estate should remain vested in the family idol and the properties should not be disposed of to meet the debt of any one. It was held that as there was no reservation of any proprietary right or interest in the property in favour of the family of the testator, but the heirs were expressly excluded from all right of inheritance to the property it was impossible to hold that the intention of the testator was to leave his estate to his heirs, subject merely to a charge in favour of the idol mentioned in the will. In *Sree Sree Ishwaree Bhubaneshwaree Thakurani* v. *Braja Nath De*[2], the Privy Council referred to the importance of the directions given for the disposal of the surplus income and in *Abiba Ali* v. *Alhaji Mama Ali*[3], their Lordships held that a devise of rent of land for an indefinite period was equivalent to the devise of the land itself. These decisions lend great support for the contention of the

1. (1906) 3 C L J. 224 at 233. I L R (1937) 2 Cal. 447 (P.C).
2. (1937) 2 M .L.J. 527 : L.R. 64 I.A. 203 : 3. (1942) 56 L W. 1 (P.C.).

appellants that the will was intended to operate as a dedication of the properties named in it for charitable uses and not merely to create charges in favour of the charities

We hold that as Sethuraman accepted the will and took up the office as trustee there is a valid dedication to charitable uses and the plaintiff has no right to any of the properties covered by the will It may be mentioned that after the trial had commenced she applied to amend the plaint by pleading that if there was a valid dedication to the charities named by her father the trusteeship had devolved upon her The Subordinate Judge refused the application and the case proceeded merely as a claim by the plaintiff to the properties as the heir of her brother The trust was not represented

It follows from what we have said that the title to the properties which *are covered by the will* and which were alienated by Swarnavalli cannot be decided in these proceedings The validity of alienations of properties dedicated to charity, can, of course, be challenged by a person interested in the trust in a suit properly framed For instance, an interested person could with the leave of the Advocate-General file a suit for the framing of a scheme and on the framing of the scheme the trustees appointed thereunder could take necessary action for the recovery of properties improperly alienated.

In O S No 90 of 1942 the plaintiff sought a decree setting aside the alienations of twenty-two items of property Except in the case of three all these properties are covered in their entirety by the will In each of the three excepted items, Nos. 17, 20 and 21, Sundaram possessed only a moiety at the time he made his will. In each case the other moiety was purchased by Sethuraman after Sundaram's death At the time of the institution of the suit the fourteenth defendant was in possession of Nos 20 and 21 and the fifteenth, sixteenth and seventeenth defendants in possession of No 17. The Subordinate Judge set aside all the alienation challenged in the plaint, but the only alienees named in O S No 90 of 1942, who have appealed are the fifth and sixth defendants, the former being in possession of item No 3 and the latter of item No 2 As the plaintiff possesses no title to these properties, the appeal of the fifth and sixth defendants (No 113 of 1914) must be allowed with costs against her

As we have already indicated, the appellant in appeal No 436 of 1944 is the second defendant She claims to be an assignee of a usufructuary mortgage of one of the items of the property dedicated by the will to charity The Subordinate Judge allowed the plaintiff's claim He considered that this item was not covered by the will and that the plaintiff as the heir of her brother was entitled to it No necessity for the mortgage by Swarnavalli was shown We consider that this decision was right The property was purchased by Sundaram twenty days after he made his will The terms of the will do not provide justification for holding that the dedication included all the properties of which the testator died possessed. To the will was annexed a schedule of moveable and immoveable properties which he intended should constitute the endowment for the charities As this property was not included in the schedule and as there is no evidence that it was purchased out of any of the outstandings mentioned in the schedule, it must be held that to this extent the testator died intestate, which means that the plaintiff acquired a title to it on the death of her brother Appeal No 436 of 1944 is dismissed with costs in favour of the plaintiff

B.V V. ——— *A S No* 113 *of* 1944 *allowed*
A S. No 436 *of* 1944 *dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE KUPPUSWAMI AYYAR

Devata Talipulamma *alias* Mahalakshmamma by her husband and general power-of-attorney holder Devata Kamaraju *Petitioner* *

Court-Fees Act (VII of 1870), section 5—Order directing payment of deficit court-fee—Finality of—Civil Procedure Code (V of 1908), section 115 and Order 33, rule 8—Revision petition by a pauper plaintiff—Court-fees if should be paid

As a revision petition did not bear the necessary court-fees it was returned for the payment of necessary court-fees But the petitioner contended that no court-fee was payable as he was recognised as a pauper in the suit in which the order sought to be revised was passed and refused to pay the court-fee demanded The matter was posted before the Master, who, on the petitioner not appearing when called, ordered the payment of the deficit court-fee within two weeks In a petition for directing refund of the court fees paid under such circumstances,

Held, that the taxing officer's order was final as the petitioner was absent in spite of notice to him

Held further, that the scheme of the Code clearly showed that Order 33 was intended to relate only to proceedings in the Court in which the suit was filed and the revision petition cannot be said to be a proceeding connected with the suit in the same Court Moreover, there is no provision separately made enabling parties to file applications without paying court-fees in the High Court except when proceedings are taken by way of appeal

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing refund of the court-fee paid in C R P No 1239 of 1945 presented to the High Court to revise the order dated 17th January, 1945, in I. A. No. 1655 of 1944 in O S No. 226 of 1943 on the file of the Court of the District Munsiff, Peddapuram.

Petitioner in person

The Court made the following

ORDER :—This is a petition by the petitioner in C R P No. 1239 of 1945 on the file of this Court for directing a refund of the court-fees paid by him in the said civil revision petition He had filed this revision against the order passed in O S No 226 of 1943 on the file of the District Munsiff's Court, Peddapuram His contention is that he was recognised as a pauper, and therefore he is entitled to file the revision petition without paying the necessary court-fees The petition was returned to him for paying necessary court-fees and he would not pay the same The matter was posted before the Master and he passed the following order on the 22nd August, 1945

"The petitioner is called He is absent The appeal examiner's view is correct Deficit court-fee will be paid in two weeks."

Under section 5 of the Court-Fees Act the decision of the Taxing Officer is final but it is urged that it was only an *ex parte* order and therefore a nullity But this is not a case in which the petitioner was not given notice He was called and he was absent Therefore the Taxing Officer had to pass an order in his absence

My attention is drawn by the petitioner to certain observations of the Patna High Court in *Krishna Mohan Sinha* v *Raghunandan Pandey*[1] to the effect that the decision of the Taxing Officer is not final where he has proceeded *ex parte* That is on the question as to the value of the subject-matter of the suit and further it is also stated in that observation that the decision would not be final if it has proceeded *ex parte* and without giving an opportunity to the suit or to show by adducing evidence what the value of the subject-matter is In this case the petitioner had been given notice but he was absent In view of section 5 of the Court-Fees Act, I have no jurisdiction now to go into the question as to whether the court-fee paid was payable or not

Even on the merits I do not think I will be justified in ordering a refund It is true that in Order 33, rule 8, it is stated that where once a person had been permitted to file a suit as a pauper he shall not be liable to pay any court-fee other than the fees payable for service of processes in respect of any petition, appointment of a pleader or other proceeding connected with the suit. It is urged that the civil revision petition is a proceeding connected with the suit and that the words "in

* C M P No 5380 of 1945 5th December, 1945.

1. (1924) I.L R. 4 Pat 336 (F B)

the same Court or in the same forum" are not found in Order 33, rule 8, and therefore even though the civil revision petition is filed in the High Court he is entitled to file a petition without court-fees, because it is a proceeding connected with the suit. There will be some force in this argument if the only provision for the purpose of deciding this point is Order 33, rule 8. The scheme of the Code clearly shows that Order 33 was intended to relate only to proceedings in the Court in which the suit was filed and that in respect of the proceedings subsequently instituted by way of appeal, there is another provision made as to how parties should conduct those proceedings as paupers I do not hence think I will be justified in accepting the contentions of the petitioner that he is entitled to pay no court-fee on a petition filed for revision of the lower Court's order under section 115 by reason of the provisions of Order 33, rule 8 It is also significant that there is no provision separately made enabling parties to file applications without paying court-fees in the High Court except when proceedings are taken by way of appeal. In the result, the petition is dismissed.

V.S ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE SOMAYYA.

Kovvuru Lakshmipathiraju and others .. *Appellants**

v.

Jagani Venkataswami and others .. *Respondents.*

Limitation Act (IX of 1908), *Article* 11-*A—Civil Procedure Code (V of* 1908), *Order* 21, *rules* 101 *and* 103—*Suit on a mortgage—Purchaser not impleaded—Decree and sale—Application by prior purchaser for re-delivery dismissed in execution proceedings—Suit by that purchaser for redemption and for delivery—Basis of suit different from title put forward in execution proceedings—Article* 11-*A not a bar—Practice—Amendment of plaint—Principles governing*

One of several mortgagors who held the mortgaged property jointly sold an undivided one-fourth share of the property, the consideration to be paid to the mortgagee The mortgagee filed a suit on his mortgage without impleading the purchaser, obtained a decree and bought the property in execution The prior private purchaser filed an execution application asking for re-delivery of the property purchased by him, but it was dismissed More than a year later he filed a suit for redemption of the mortgage and for delivery of properties purchased by him or in the alternative for delivery of one-fourth share of the mortgaged property That the one-fourth share of the entire mortgaged properties should be given to him after partition was sought to be made clear by an application for amendment which was dismissed On a contention that the suit was barred by Art 11-A of the Limitation Act,

Held, that if the title which is put forward as the basis of suit is the same as the title which is put forward in the execution proceedings as the basis for an order in his favour, then Order 21, rule 103 would be a bar, but not otherwise Further, if the relief that is asked in the later suit is not one which the plaintiff could have got in the execution department, then the fact that he did not pursue the remedies given under the execution chapter will not bar the later suit The basis of the suit in this case was different from the title put forward in the execution proceedings and as the relief of partition and delivery of his one-fourth share could not be obtained in the execution department, Article 11-A would not operate as a bar to the suit

Kaleswarar Mills, Ltd v *Govindaswami Naicker*, (1945) 2 M L J 403, followed and *Ambica Charan Bakta* v *Ram Prosad Chatterjee*, (1925) 30 C W N 163, referred to

Held further, that all amendments which do not throw an unnecessary and unreasonable burden on the other side should be allowed and only those amendments which cannot be compensated by an award of costs—they alone—should be refused, and as such the amendment sought for in the present case should be allowed

Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam in A S. No. 73 of 1944, preferred against the decree of the Court of the District Munsiff of Chodavaram in O. S No. 51 of 1941.

E Venkatesam for Appellants.

S. Ramamurthi for Respondents.

The Court delivered the following

JUDGMENT.—The suit has been dismissed as barred under Article 11-A of Schedule I of the Indian Limitation Act as having been brought more than one year after an order was passed under rule 101 of Order 21, Civil Procedure Code. The appellants are the purchasers of one-fourth right in certain properties which

* S. A. No. 2479 of 1944. 9th November, 1945.

were mortgaged under P-1. K Appala Narasimharaju and six others executed the mortgage, Ex. P-1, on 26th October, 1915 The mortgaged property consisted of about 24 acres which were held jointly by the several mortgagors One of the mortgagors, K. Appala Narasimharaju, executed a sale deed of a fourth of the property under Ex P-2 dated 18th February, 1918, for a stated consideration of Rs. 300, which was directed to be paid to the mortgagee under Ex P-1 The property that was sold was 6 acres being an undivided one-fourth of a property which is described to have been held jointly by the vendors and others and to be situated within the boundaries given in paragraph 3 of Ex P-2. The mortgagee filed O S No 769 of 1925 to recover the amount due under Ex P-1 But unfortunately he did not implead the subsequent purchaser under Ex P-2. A final decree was passed in that suit and the properties were brought to sale and purchased by the decree-holders They obtained possession of the properties purchased by them and thereupon the plaintiffs in this action filed E A No 170 of 1938 asking for re-delivery of the property which had been purchased by them This was refused by an order Ex D-5, dated 20th October, 1938 The present suit was filed on 8th December, 1940, for redemption of the mortgage, Ex P-1, and for delivery of the properties mentioned in the schedule attached to the plaint on the ground that those properties had been allotted as and for the one-fourth share which he purchased, or, in the alternative, for one-fourth share of the lands that were mortgaged under Ex. P-1 No doubt, there is no definite prayer that the one-fourth of the entire mortgaged properties should be given to him after partition, but that is obviously the sense and intendment of the plaint This was sought to be made clear by an application for amendment But, curiously, though the application was made three months before the suit came on for trial, it was dismissed and that has led to some complication. The application was dismissed on the ground that the nature of the suit will be changed. But it is difficult to see how it is In paragraph 8, clause (*b*) the plaintiff asked in the alternative that he might be given one-fourth share of the mortgaged properties The amendment was that it might be given to him after partition. This is merely clarifying the position which had already been put forward in the plaint and it was obviously a case for allowing the amendment. Too technical a view, I regret to find, is being taken by the subordinate Courts of late in discharging their duties as to amendments All amendments which do not throw an unnecessary and unreasonable burden on the other side should be allowed and only those amendments which cannot be compensated by an award of costs—they alone—should be refused Here is a case in which the plaint itself had obviously asked for a delivery of the one-fourth share of the entire properties and that was obviously meant to be after partition ; and when the matter was sought to be put more clearly, all kinds of technical pleas were evidently advanced by the defendant ; and as I said before, it is regrettable to find that they were upheld by the District Munsiff I allow the formal amendment. This, however, does not solve the difficulty raised in the suit The main defence was that the suit is barred by limitation as it was filed more than one year after date of the order dismissing E. A. No. 170 of 1938. This objection has been upheld ; but I am unable to agree with the decision of the lower Courts. The bar under rule 103, of Order 21, runs in these terms .

> " Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99, or rule 101 may institute a suit to establish the right which he claims to the present possession of the property, but subject to the result of such suit (if any), the order shall be conclusive "

Rule 63 of the same order runs in these terms :

> " Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive "

Leaving out the other portion of the two rules which are not material for our purpose, the wording in so far as it is material may be set out thus .

RULE 63	RULE 103
" May institute a suit to establish the right which he claims to the property in dispute . . "	" May institute a suit to establish the right which he claims to the present possession of the property . . . . ."

The difference between the expression "May institute a suit to establish the right which he claims to the property in dispute," and the expression "May institute a suit to establish the right which he claims to the present possession of the property" is, I think, immaterial As has been held by this Court the order in the execution department will be conclusive as regards the title of the parties if no suit is filed within one year So far as the execution department is concerned enquiry is no doubt confined to the question whether the person objecting to delivery or claiming re-delivery in one case or objecting to the attachment in the other case was in possession in his own right and not on behalf of the judgment-debtor But once an order is made against a particular party, be he the decree-holder or the objector, the suit should be filed by the unsuccessful party, and if not, the right which he claims to the property will be lost It is enough in this connection to refer to a recent decision of the Chief Justice and Rajamannar, J, in *Kaleswarar Mills, Ld* v *Govindaswami Naicker*[1]. Rajamannar, J, who delivered the judgment has gone through the question at length and after referring to the earlier decisions of this Court and of the other Courts, has pointed out that if the title which is put forward as the basis of the suit is the same as the title which is put forward in the execution proceedings as the basis for an order in his favour, then rule 103 will be a bar but not otherwise One case which is referred to in that judgment is instructive, and that is the decision of the Calcutta High Court in *Ambica Charan Bakta* v *Ram Prosad Chatterjee*[2] There, the landlords obtained a decree for arrears of rent and in execution of that decree purchased the holding and took possession. Later on, they were dispossessed by and order of the Court passed at the instance of the defendants who claime possession of the property on their own account and not on behalf of the judgment-debtors More than a year afterwards the landlords abandoned the rights under their auction-purchases in execution sale and filed a suit for ejectment on the ground that the tenants wrongfully parted with the holding, that the transfer worked out a forfeiture of the tenancy and that the transferees were therefore liable to be ejected The order passed by the Court in the execution proceedings was sought to be relied on to defeat the plaintiffs' claim for possession It was then pointed out that the cause of action for the two suits, one under rule 103 and the other on forfeiture of the tenancy on account of the alienation were quite different It was further pointed out that in the later suit the plaintiffs actually acquiesced in the validity of the order passed under Order 21, rule 101, and in fact gave up their rights under their purchase in execution sale But they only claimed rights which were given to them under the Bengal Tenancy Act It was pointed out that in such cases, the one year rule will not apply In the present case, unfortunately, the petition on which the previous order was passed has not been exhibited It is not known what exactly the allegations were Therefore it cannot be said that the cause of action or the title on which the present suit is based was the very same title on which the relief was asked in E A No 170 of 1938 That is enough to dispose of the matter But it may be pointed out that there is yet another rule which is laid down by this Court and that is, if the relief that is asked in the later suit is not one which the plaintiff could have got in the execution department, then the fact that he did not pursue the remedies given under the execution chapter will not bar the later suit The present suit is one for redemption The plaintiff recognises that without redemption and without offering to pay the amount due under the mortgage he cannot get the relief of possession That is one distinction The other is that in the present suit he asks, at any rate in the alternative, for partition and delivery of his one-fourth share. This, again, he cannot get in the execution department If, in the execution department, he had said that he was entitled to an undivided one-fourth of the whole, he would have been told that he could not get relief by way of partition in the petition E A No 170 of 1938 For these reasons I hold that the suit was not barred under Article 11-A of the Limitation Act.

There is yet another question raised that the suit is only one for partial redemption and that it does not lie The mortgagee decree-holder has already become

1. (1945) 2 M L J. 403.

2. (1925) 30 C.W.N. 163.

the owner of the other three-fourths, his purchase of the other one-fourth being invalid as he did not implead the purchaser of that one-fourth It is a matter for consideration by the lower appellate Court whether, when the mortgagee has himself become the owner of a part of the mortgaged property, the indivisible character of the mortgage has not been split up, and whether a suit by a purchaser of the remainder of the mortgaged property is not entitled to redemption Even if a finding is to be recorded against the plaintiffs on that point it would still be a matter for consideration by the Subordinate Judge whether on the facts of this case he ought not to allow the plaintiffs to redeem the whole property by paying the whole amount The decree of the lower appellate Court is set aside and the appeal remanded for disposal according to law in the light of the observations made above

Court-fee paid on the memorandum of second appeal be refunded , other costs shall be provided for in the revised decree of the lower appellate Court

No leave.

V P S ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE BYERS

Ragi Durgamba and another *Appellants**

v

Sri Lakshminarasimhaswamy Rice Factory, represented by its managing partner Rao Bahadur T Jalaiah and others *Respondents*

Partition Act (IV of 1893), section 6—Sale under—If to be open to the public

A sale under section 6 of the Partition Act must be public and the right to bid cannot be limited to the co-sharers as in the case of a sale under section 3 (2) of the Act

Debendra Nath Bhattacharjee v *Hari Das Bhattacharjee*, (1910) 15 C W N 552 and *Hari Charan* v *Fakir Chandra*, (1936) 40 C W N 955, distinguished

Appeal against the decree of the District Court, Guntur, in A S No 380 of 1942, preferred against the decree of the Court of the Subordinate Judge of Guntur in O S No 43 of 1940

P Satyanarayana Rao for Appellants

K Kameswara Rao and *N Rammohana Rao* for Respondents

The Court delivered the following

JUDGMENT —The only point which has been argued in this second appeal relates to the direction of the lower appellate Court that the sale under section 6 of the Partition Act, 1893, is to be open to the public It is contended that the right to bid should be limited to the co-sharers, and in support of the argument reliance is placed on two decisions The first is *Debendra Nath Bhattacharjee* v *Hari Das Bhattacharjee*[1], where there is an observation regarding a sale of the property in that case amongst co-sharers , but it is clear from the context that what the learned Judges had in mind was a sale under section 3 (2) of the Partition Act The decision is not an authority for the view that a sale under section 6 shall not be open to the public. The other case is *Hari Charan* v *Fakir Chandra*[2], but this case is not in point as it relates only to the procedure to be followed at a sale under section 3, clause (2) of the Act The wording of clauses (2) and (3) of section 6 of the Partition Act clearly contemplates the presence at the sale of bidders other than the shareholders, and it is clear that a sale under section 6 must be public If the appellant is anxious to purchase what he can of the property without running the risk of public competition, he may proceed under section 3 of the Act to acquire the shares of the two respondents who have applied for sale Having done this he may then be in a position to acquire the remaining one-sixth share held by the fifth respondent There is no necessity for any interference with the decree and the appeal is ordered to be dismissed , but as it is obvious that both sides are equally interested in avoiding the risks of open competition, there will be no order as to costs.

K S ——— *Appeal dismissed.*

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* S. A No 2044 of 1944 — 5th December, 1945

1. (1910) 15 C.W.N 552.

2. (1936) 40 C.W N 955

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Suryadevara Annapurnamma .. *Appellant**

v.

Guntta Manikyamma and others .. *Respondents.*

Hindu Law—Adoption—Widow—Sudra widow adopting with consent of sapinda—*Unchastity of widow—Effect.*

Where as in the case of Sudras no religious ceremony is essential or necessary for adoption there is no rule of Hindu Law which prevents a widow who possesses lawful authority adopting a son to her deceased husband even if she was unchaste at the time of adoption.

Thangathanni v. *Ramu Mudali*, (1882) I.L.R. 5 Mad. 358, *Basvant Mushappa* v. *Mallappa Kallapa*, (1920) I.L.R. 45 Bom. 459 and *Ramu Bala Sankpal* v. *Jana Dala Patil*, (1941) 43 Bom. L.R. 920, relied on.

Viyyamma v. *Suryaprakasa Rao*, (1942) 1 M.L.J. 331 : I.L.R. (1942) Mad. 608, explained.

Appeal against the decree of the Court of the Subordinate Judge, Masulipatam, dated 27th March, 1944, in O. S. No. 66 of 1942.

D. Munikanniah and *N. R. Amirthalingam* for Appellant.

M. Appa Rao, *A. Sambasiva Rao* and *B. Satyanarayana* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of a suit filed by a daughter against her mother for a declaration that an adoption made by her mother was invalid because the adoption took place while she was living an unchaste life. The mother, the first defendant in the suit, is the widow of one Somabrahmam, who died in the year 1911. He was also survived by a son. The son died two years after his father's death. The deceased left an estate of some 7½ acres of land and Rs. 2,000, moneys which he had lent out. His widow improved the estate and at the time of the suit it had increased considerably in value. The daughter was married to one Venkatramayya. She and her husband lived with the first defendant, as also did the first defendant's mother. The daughter has a son and it is quite clear that this suit is the result of the mother refusing to adopt her grandson.

In 1937, the plaintiff and her husband quarrelled with the first defendant with regard to the properties of the estate. They went so far as to turn the first defendant out of her own house. This resulted in the first defendant filing a suit for an injunction restraining them from interfering with her rights. She obtained a decree and by reason of it she regained possession of the house. In consequence, her daughter and her son-in-law had to live elsewhere. It was in 1942, that it was suggested that the first defendant should adopt her grandson. She refused to do this, but on the 14th October, 1942, with the consent of the nearest *sapinda*, she adopted the son of the third defendant, who died during the pendency of the suit. The third defendant is a *sagotra*. When it became clear that the first defendant intended to adopt the third defendant's son, the plaintiff caused a letter to be written to her mother in which she accused her of immorality. This letter did not affect the first defendant's decision to adopt the son of the third defendant and the adoption duly took place. The parties being *Sudras*, a religious ceremony was not necessary.

On the 10th November, 1942, that is, within a month of the adoption, the daughter filed a suit. Her case was that her mother had for a long time had immoral relations with the third defendant and that in consequence of her unchastity she was debarred under Hindu Law from adopting a son to her deceased husband. In her charge of immorality against her mother she was supported by her maternal grandmother, her husband and her maternal uncle. The Subordinate Judge considered that in view of this evidence he was compelled to hold that the first defendant had lived an unchaste life; but he went on to hold that her intimacy with the third defendant had ceased twelve months before the adoption and, relying on the judgment of this Court in *Viyyamma* v. *Suryaprakasa Rao*[1], he held that the adoption was valid. The plaintiff has appealed.

* Appeal No. 448 of 1944. 26th November, 1945.

1. (1942) 1 M.L.J. 331 : I.L.R. (1942) Mad. 608.

We are not convinced that the Subordinate Judge was right in holding that it had been proved that the first defendant had had immoral relations with the third defendant. If this had been the case, it is surprising that her daughter should have lived with her until 1937 and more surprising that the first defendant's mother should have continued to live with her thereafter The evidence is that the first defendant's mother remained in her house until a short time before the adoption The first defendant is a woman of 55 years of age and it is noteworthy that no attempt was ever made to excommunicate her from the caste What is even more important, there was no suggestion that she was leading an immoral life till the month of August, 1942, when it became apparent that the first defendant was not going to fall in with the wishes of her daughter and the daughter's husband regarding the adoption of their son

Even if the first defendant had had illicit intercourse with the third defendant, it is quite manifest that it must have ceased some months at any rate before the adoption took place The third defendant was taken ill a year before the adoption and for several months was a patient in a nursing home. There is no suggestion that the first defendant had had any other paramour We agree with the Subordinate Judge that the first defendant was not living an immoral life at the time of the adoption The adoption having taken place with the consent of the nearest sapinda, it must be held to be lawful

But even if there had been immoral relations between the first defendant and the third defendant and these relations had continued right upto the time of the adoption, we consider that the adoption would still be lawful In *Thangathanni* v. *Ramu Mudali*[1], a Bench of this Court held that amongst *sudras* no religious ceremonies are essential for adoption and that an adoption by a *Sudra* widow under pollution is not invalid In *Basvant Mushappa* v *Mallappa Kallappa*[2], the Bombay High Court expressly held that a *Sudra* woman, although living an unchaste life, could make a valid adoption because no religious ceremony was involved In *Ramu Bala Sankpal* v *Jana Dala Patil*,[3] the Bombay High Court held that a Hindu widow of a regenerate class could make an adoption while she was living in unchastity when the adopted son was of the same *gotra* as his adoptive father, because here again no religious ceremony was necessary We agree that where no religious ceremony had to be performed there is no rule of the Hindu law which prevents a widow who possesses lawful authority adopting a son to her deceased husband when she is unchaste If the adoption involved a religious ceremony, the position would be different because the unchastity must be placed on the same footing as pollution

In delivering the judgment in *Viyamma* v *Suryaprakasa Rao*,[4] I expressed the opinion that it might be taken that a Hindu widow cannot lawfully adopt in the circumstances like those set out in the report of *Sayamalal Dutt* v *Saudamini Dasi*[5], but I added that it was not necessary to consider to what length the Hindu law goes in this respect because it was quite clear that it had not been proved in *Viyyamma* v. *Suryaprakasa Rao*[4], that the widow was unchaste at the time of the adoption It is perhaps necessary to say something further about the judgment of *Sayamalal Dutt* v. *Saudamini Dasi*[5]. There a Hindu widow was living in concubinage and purported to receive a son in adoption while in a state of pregnancy resulting from the concubinage She was a *Brahmin.* The report does not disclose whether the boy she purported to adopt belonged to the same *gotra*, but the judgment indicates that ceremonies were necessary The case was decided by Norman, J., who held that under the particular circumstances she could not make an adoption. The judgment in *Viyyamma* v *Suryaprakasa Rao*[4], did not purport to go beyond that decision and the observations there must be confined to a case where the facts are identical with those in *Sayamalal Dutt* v *Saudamini Dasi*[5].

We hold that the alleged immorality of the first defendant has not been proved, that in any event she was not living an unchaste life at the time of the adoption,

1 (1882) I L R 5 Mad 358
2 (1920) I L R 45 Bom 459
3 (1941) 43 Bom L R. 920.
4 (1942) 1 M L J 331 · I L R (1942) Mad. 608
5 (1870) 5 Beng L R 362.

and that even if she were, she being a *Sudra* and no ceremony being necessary, she could under Hindu Law make a lawful adoption

It was said in the lower Court that the consent of the nearest sapinda was purchased, but the Subordinate Judge refused to accept this plea and it has not been pressed before us

The appeal fails and is dismissed with costs in favour of the first and second respondents

B V V — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE KUPPUSWAMI AYYAR

Josiah Decruz *Petitioner**

Defence of India Rules (1939), *rule* 90-*B*—*Sea Customs Act* (*VIII of* 1878), *section* 3 (c)—*Complainant must be the Customs Collector—Need not be entitled to assess the penalty leviable under the Act—Enough if he is satisfied that the penalty leviable under the Act is inadequate*

Where the prosecution case was that gold was exported out of India and thereby the accused committed an offence punishable under rule 90-B of the Defence of India Rules and the complaint was signed by a person who answered to the description of " Customs Collector ",

Held, that it is not necessary that the "Customs Collector" should be entitled to assess the penalty leviable under the Act and it is enough if he is satisfied that the penalty provided by the Act is inadequate and he can give a complaint.

Petition under section 439 of the Criminal Procedure Code, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate, Ramnad, dated 20th June, 1945, in C C No 79 of 1945

K S Champakesa Aiyangar, T R. Srinivasa Aiyangar and *K C. Srinivasan* for Petitioner

The Public Prosecutor (*V L Ethiraj*) for the Crown.

The Court made the following

ORDER —This petition arises out of a prosecution by the Sea Customs Department in respect of an offence punishable under rule 90-B of the Defence of India Rules The prosecution case was that gold was exported out of India and thereby the accused committed an offence punishable under rule 90-B It was made an offence only under the Defence of India Rules and Rule 90-B as amended, has a proviso, which runs thus

" Provided that where in respect of any contravention of this rule the Customs Collector is of opinion that the penalties provided in the said Act are inadequate he may make a complaint to a Magistrate having jurisdiction "

It is urged that in this case the person who filed the complaint is not the proper person who can file the complaint as per that proviso It is admitted that the complaint was filed by a person who answers to the description " Customs Collector " as defined in section 3 (*c*) of the Sea Customs Act But what is urged is that the person who signed the complaint is not the person who can decide the case if a penalty is to be levied under the Sea Customs Act in respect of the gold said to have been exported in this case and that the person who filed the complaint though he satisfied the description of a "Customs Collector" according to section 3 (*c*) of the Sea Customs Act was not the person who is entitled to assess the penalty leviable in respect of this particular transaction under the Sea Customs Act This is a case in which the prosecution desires a heavier sentence to be imposed and for deciding what the punishment is that has to be imposed in this case it is not necessary that the person who has to decide it should have the power to levy the penalty The maximum penalty leviable under the Act is known and, if such penalty is not adequate in the opinion of the person who is empowered to prosecute, it will be open to him without having the power to levy the penalty to decide the point and file the complaint, and that is what has been done in this case I see no reason to interfere I accordingly dismiss this petition

V P.S — *Petition dismissed.*

*Cr R. C No, 503 of 1945 (Cr. R. P. No. 463 of 1945). 29th November, 1945.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

V. L. V. Venkatachalam Chettiar (*died*) and another . *Appellants**

v.

The Province of Madras, represented by the Collector of Tanjore at Tanjore and another *Respondents.*

Madras Revenue Recovery Act (II of 1864), *sections* 59 *and* 38—*Civil Procedure Code (V of* 1908), *Order* 21, *rules* 63 *and* 103—*Sale by Government for arrears of water cess and quit rent alleged to be due to the Government—Purchaser put in possession—Application by owner to Collector under section* 38 *of Madras Revenue Recovery Act—Dismissal—Suit by owner for a declaration that the sale and demand for arrears of quit rent are* ultra vires *and an order cancelling the sale—Nature of the suit—If maintainable without a prayer for consequential relief—Specific Relief Act (I of* 1877), *section* 42—*Proviso.*

In proceedings under the Madras Revenue Recovery Act the plaintiff's village was sold for arrears of water cess and quit rent alleged to be due to the Government and the second defendant, the purchaser was put in possession. The plaintiff applied to the Collector under section 38 of the Act for an order setting aside the sale on the ground of material irregularity in the publication and conduct of the sale but the application was dismissed. Thereafter the plaintiff filed the present suit and the reliefs claimed were a declaration that the sale and demand for arrears were *ultra vires* and an order cancelling the sale. On a contention that the suit was not maintainable without a prayer for consequential relief,

Held, that the right of suit given under section 59 of the Act corresponds to the right of suit given to a person aggrieved by an order under Order 21, rules 63 and 103 of the Civil Procedure Code and as it is unnecessary for the plaintiff in such a suit to sue for a consequential relief where he has taken action under either of these rules it is difficult to see how the plaintiff can be required to ask for consequential relief in a suit filed under section 59 of the Madras Revenue Recovery Act. The mere fact that the plaintiff sued for a general declaration that the Government had no power to collect water cess or arrears of quit rent does not take the suit out of section 59 of the Act.

Kristnam Soorayya v. *Pathma Bee*, (1905) I.L.R. 29 Mad. 151 (F.B.) and *Firm Ram Chandra* v. *Sundarlal Singh*, A.I.R. 1938 Pat. 558 referred to.

Appeal against the decree of the Court of the Subordinate Judge, Tanjore, in A. S. No. 52 of 1943, preferred against the decree of the Court of the District Munsiff, Tanjore, in O. S. No. 279 of 1940.

A. Swaminatha Aiyar and *S. Thiagaraja Aiyar* for Appellants.

The Government Pleader (*K. Kuttikrishna Menon*) and *T. K. Subramania Pillai*, for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant, the plaintiff in the suit, was the owner of the inam village of Dalavapalayam in the Tanjore District. In proceedings instituted under the Madras Revenue Recovery Act of 1864 the village was sold for arrears of water cess and quit rent alleged to be due to Government. The purchaser was the second defendant. The attachment and sale had been ordered by the Revenue Divisional Officer. The plaintiff applied to the Collector under section 38 of the Act for an order setting aside the sale on the ground of material irregularity in the publication and the conduct of the sale. By an order dated the 5th June, 1940, the Collector dismissed the application. On the 17th June, 1940, the plaintiff served upon the Provincial Government, the first defendant, a notice under section 80 of the Code of Civil Procedure. On the 26th August, 1940, he filed the present action in the Court of the District Munsiff of Tanjore. In his plaint he alleged that he was under no liability to pay water cess and that he was not liable in law for arrears of quit rent. He also averred that the sale was illegal by reason of the defects in the publication and the conduct of it. The reliefs claimed by the plaintiff were a declaration that the sale and the demand for arrears of quit rent were *ultra vires* and an order cancelling the sale. The second defendant pleaded that the suit could not be maintained without a prayer for consequential relief. On the 19th June, 1940, by an order passed under section 40 of the Madras Revenue Recovery Act by the District Munsiff of Tanjore the second defendant was put into possession of the property. It was in these circumstances that the second defendant

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*S.A. No. 970 of 1944. 4th December, 1945.

maintained that the plaintiff was bound by reason of section 42 of the Specific Relief Act to sue for possession and stamp his plaint according to the value of the property This plea was accepted by the District Munsiff who dismissed the suit without deciding any of the other questions raised on the pleadings His decision was concurred in by the Subordinate Judge of Tanjore on appeal The plaintiff has now appealed to this Court

In hearing an application under section 38 of the Madras Revenue Recovery Act, the Collector is in reality sitting as an appellate Tribunal and any order passed by him on such an application is conclusive, subject to a suit being filed. Section 59 says that nothing contained in the Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under the Act, except as specifically provided, from applying to a Civil Court for redress, but it adds that the suit must be instituted within the six months from the time at which the cause of action arose The right of suit given here corresponds to the right of suit given to a person aggrieved by an order under rule 63 of Order 21, of the Code of Civil Procedure or by an order under rule 103 of that order

In *Kristnam Soorayya* v *Pathma Bee*[1] a Full Bench of this Court held that the special right conferred by section 283 of the Code of Civil Procedure, 1882, which corresponds to Order 21, rule 63 of the present Code, is not controlled by the proviso to section 42 of the Specific Relief Act and therefore the plaintiff in such a suit is not bound to ask for any further relief to which he may be entitled The question whether the proviso to section 42 of the Specific Relief Act applies to suits under Order 21, rule 63, has not been raised in this Court. The same considerations which apply to suits under rule 63, must, however, apply to suits under rule 103 The question did arise in *Firm Ram Chandra* v *Sunderlal Singh*[2], where the Patna High Court applied the decision of this Court in *Kristnam Soorayya* v *Pathma Bee*[1], to a suit under Order 21, rule 103 As it is unnecessary for the plaintiff to sue for consequential relief when he has taken action under either rule 63 or rule 103, it is difficult to see how he can be required to ask for consequential relief in a suit filed under section 59 of the Madras Revenue Recovery Act

The learned Advocate-General on behalf of the second defendant says that the fact that the plaintiff is suing for a general declaration that the Government had no power to collect water cess or arrears of quit rent takes the suit entirely out of section 59 We are unable to accept this contention The suit is clearly one under section 59, but it contains an additional ground for relief That in itself cannot bring the suit within the mischief of the proviso to section 42 of the Specific Relief Act

In *Thiruvenkatacharyulu* v *Secretary of State for India*,[3] a Division Bench of this Court held that an act which was in itself *ultra vires* had not got to be set aside , in other words it was void *ab initio* In *Gnanasambanda Pandara Sannadhi* v *David Nadar*[4], another Division Bench of this Court held that where a purchaser at a revenue sale had been put in possession under section 40 of the Madras Revenue Recovery Act the civil Court should order restitution if the sale was set aside If the plaintiff in this case succeeds in his pleas, the action of the revenue authorities in selling his village will be unlawful and he will be entitled to a declaration that the sale is void, which means that the District Munsiff will be in a position to order the second defendant to restore possession of the property to the plaintiff, if such an order is necessary

The appeal is allowed and the case is remanded to the trial Court to hear and determine the other issues in the case in the light of this judgment As the appeal has been opposed by the second defendant he must pay the appellants' costs in this Court and the Court of the Subordinate Judge. The costs in the trial Court will abide the further hearing The plaintiff is entitled to a refund of the Court-fees paid by him in the Subordinate Judge's Court and in this Court.

V.P.S *Appeal allowed.*

1. (1905) I.L R 29 Mad 151 (F.B).
2. A.I R 1938 Pat 558.
3. (1933) 66 M L J 715 · I.L R 57 Mad. 501.
4. (1904) 14 M L J. 433.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE WADSWORTH AND MR JUSTICE RAJAMANNAR

The Official Receiver of South Arcot *Appellant**

v

K V M P KT Alagappa Chettiar and others .. *Respondents.*

Limitation Act (IX of 1908), Article 120—Mortgage executed by insolvent—Suit by Official Receiver for declaration as being sham and nominal—Alternative claim under Section 53 of the Transfer of Property Act—Starting point of limitation—Knowledge of plaintiff—Inference from facts

A suit filed by the Official Receiver for a declaration that the mortgage executed by the insolvent was sham and nominal is governed by Article 120 of the Limitation Act Where in such a suit an alternative claim is made under section 53 of the Transfer of Property Act, the latter claim will also be governed by the same article In such cases, time begins to run from the date of the plaintiff's knowledge of the fraudulent nature of the transfer Where the plaintiff is the Official Receiver, though he represents the body of creditors, it is *his* knowledge that should be taken into consideration rather than the knowledge of this or that creditor which might or might not have reached the Official Receiver. Mere knowledge of the existence of a document transferring the property of the debtor is not enough There should be knowledge of facts which would invariably lead to a definite inference that the transfer was made with an intent to defeat or delay creditors.

Appeal against the decree of the Court of the Subordinate Judge, Cuddalore, in O S No 14 of 1943

V V. Srinivasa Aiyangar and *P. S. Sarangapani Aiyangar* for Appellant

V. Radhakrishniah and *T. S Nagaswami Aiyar* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, J.—This is an appeal by the Official Receiver of South Arcot from the decree and judgment of the Subordinate Judge of Cuddalore dismissing the suit instituted by him for a declaration that the deed of mortgage executed by the insolvent one Kadiresan Chettiar in favour of defendants 5 to 8 on 29th January, 1932, in respect of properties mentioned in the plaint schedule is a sham and nominal transaction, or, in the alternative, for a declaration that the said deed of mortgage is not binding on the plaintiff or any of the creditors under section 53 of the Transfer of Property Act Defendants 1 to 3 are the sons of Kadiresan Chettiar who died in March, 1940, before the institution of the suit. Defendant 4 is a creditor of the insolvent who claims to have purchased the interests of the sons in item 1 of the plaint schedule Defendant 9 is a subsequent purchaser from the fourth defendant Defendant 10 is the Official Receiver of Pudukottah, made a party because of an insolvency petition filed against the same Kadiresan Chettiar in the Chief Court, Pudukottah The suit has been dismissed on the preliminary point of limitation and oral and documentary evidence was confined to the issue of limitation.

The mortgage in question was for a sum of Rs. 52,101-1-7 and this sum was alleged to be the total amount of debts due by the insolvent to the four mortgagees severally. This sum was secured on the residential house of the insolvent in Kottaiyur of considerable value and a small piece of land at Chidambaram apparently added to enable the deed of mortgage to be registered at Chidambaram The mortgagees were closely related to the insolvent. The fifth defendant was the father-in-law of one of his sons (defendant 2). The sixth defendant was the elder sister and the seventh defendant was the daughter of the sixth defendant. The eighth defendant was the elder brother of the insolvent in the family in which he was born (he had been adopted). Kadiresan Chettiar appears to have been in involved circumstances at about this time. Soon after this deed, one K. M C Chinnayya Servai filed a petition, I P No 8 of 1932, on 20th June, 1932, in the Court of the Subordinate Judge of Devakottah to adjudge Kadiresan Chettiar as an insolvent and among the acts of insolvency alleged to have been committed, the mortgage in question was one. It was alleged that " the said document is a sham and nominal transaction and in any event a fraudulent preference intended to defeat and delay the petitioner and other creditors " This petition was, however, dismissed on 9th

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*Appeal No. 530 of 1944. 21st November, 1945.

April, 1934 Another petition by one Muthukaruppan Chettiar (I P No 20 of 1932, Sub-Court, Devakottah) to adjudicate Kadiresan Chettiar an insolvent shared the same fate by its dismissal on 24th January, 1933

On 8th July, 1935, Kadiresan Chettiar himself filed a petition in the Court of the Subordinate Judge of Cuddalore to be adjudged an insolvent and on 14th July, 1936, an order of adjudication was passed It appears however, that the Official Receiver had been appointed an *interim* receiver even on the 17th July, 1935 There was a change in the personnel of the Official Receiver and the present appellant took charge on 5th September, 1938 There was a public examination of the insolvent in 1939 On 18th October, 1940, the Official Receiver prayed for sanction to file a petition under section 4 of the Provincial Insolvency Act impeaching the mortgage But the Subordinate Judge refused to accord sanction mainly on the ground that the matter was too complicated. It is unfortunate that the Subordinate Judge refused sanction as we consider that it was proper for him to have enquired into the matter, and if such an enquiry had been made at that stage, this litigation could have been avoided After this order, one of the creditors, Muthukaruppan Chettiar, attempted to induce the Official Receiver to file a suit. But naturally the Official Receiver was unwilling to file a suit after the above order of the learned Subordinate Judge Sanction was, however, accorded to the creditor himself to file a suit at his own risk But subsequently on the creditor undertaking to finance the litigation, sanction was accorded to the Official Receiver himself to institute the present suit

The suit was filed on the 24th February, 1943, and defendants 5 to 8, that is, the mortgagees, contend that the suit is barred by limitation The first question that arises for decision is, what is the article applicable to the suit? Mr V V. Srinivasa Aiyangar, the learned advocate for the appellant, attempted to argue that there could be no question of limitation at all to a suit like the present from the standpoint of the first of his alternative prayers, namely, for a declaration that the deed was sham and nominal He stressed the distinction between a fraudulent and fictitious transfer and contended that it was unnecessary to set aside a sham document, that it could be ignored and relief obtained so long as the right of the real owner was not extinguished by the operation of the provisions of section 28 of the Limitation Act He cited the well-known ruling of the Privy Council in *Pethaperumal Chetti* v *Muniandi Servai*[1], and other decisions We consider that there is no substance in this connection. No doubt, it was held in *Pethaperumal Chetti* v. *Muniandi Servai*[1], that if a document was sham and colourable, it could be ignored and did not need to be set aside under Article 91 of the Limitation Act and a suit for possession would be governed by Article 144 of the Limitation Act In the present case there is no question of the plaintiff praying for possession The suit is for a declaration and the only article applicable to a suit for a declaration is Article 120

The alternative claim in the plaint, which we consider is really the substantial claim, is under section 53 of the Transfer of Property Act It was not seriously disputed by either side that to a suit under that section the proper article applicable is Article 120 As that section does not affect the validity of the transaction as between the parties to it but confers only a right on the creditors to avoid it, Article 91 has been held not to apply and the residuary article has, therefore, been applied, at any rate consistently in this Court (Vide *Pachamuthu* v *Chinnappan*[2], *Narasimham* v. *Narayana Rao*[3], *Venkateswara Iyer* v *Somasundara Chettiar*[4])

The more difficult question, however, is when does time begin to run? According to the third column of Article 120, it is "when the right to sue accrues". When does the right to institute a suit under that section accrue to a creditor or, in the present case to the Official Receiver? Section 53 of the Transfer of Property Act as amended by Act XX of 1929, runs as follows.

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1 (1908) 18 M L J 277 35 I A 98 35 Cal. 551 (P C)
2. (1887) I.L R 10 Mad 213.
3 (1925) 22 L.W 592
4 (1917) 7 L W. 280.

"Every transfer of immoveable property made with intent to defeat and delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration"

Without referring to any of the authorities and looking at the plain language of the section and the language of the third column of Article 120 it appears reasonable to hold that the right to sue accrues to a creditor when he is defeated or delayed, *i e*, when his right to have the particular property covered by the transfer available to satisfy his debt is denied or infringed This ordinarily would be on the date of the alienation itself However the preponderance of authority is against taking the date of alienation as the starting point of limitation This is not because of the language of the statute of limitation but because of several other considerations One such consideration is that the term "creditor" in section 53 includes not only creditors at the time of the transfer but also those who subsequently become creditors (vide *Thomas Pillai* v *Muthuraman Chettiar*[1]). Another possible consideration is that transfers of this class are ostensibly valid and it may be only on discovery of facts not appearing *ex facie* that the real nature of the transaction may become evident That is why we find learned Judges giving a rather wide interpretation to the language of the statute

The general consensus of opinion among Judges with the exception of one learned Judge appears to be to hold that "knowledge" is a factor which should determine the starting point of limitation for a suit under section 53 of the Transfer of Property Act Venkatasubba Rao, J, alone was of opinion that the starting point of limitation was the date when the plaintiff exercised his option to avoid the transfer (vide *Narasimham* v *Narayana Rao*[2]) That was a Letters Patent Appeal against the decision of Krishnan, J, in second Appeal Venkatasubba Rao, J, thought that his view was the view that Krishnan, J, intended to hold, but we are unable to agree Madhavan Nair, J, differed from Venkatasubba Rao, J, on this point We are clearly of opinion that the date of the exercise of the option cannot be regarded as the starting point of limitation for a suit under section 53 of the Transfer of Property Act The fact that the exercise of such option can be by the institution of the suit itself shows that this could not be the starting point With great rsepect to the learned Judge we consider that he erred in thinking that the option mentioned in section 53 could be exercised at any time and that it was the exercise of his option that gave him a right to sue What gives him a right to sue is the fact that the transfer was made with intent to defeat or delay the creditors What the section says is that such a transfer is not *ipso facto* void but voidable if any creditor desires to avoid it A person may have a right but may not choose to enforce it But when he enforces it, time should commence to run from the time when he could first have enforced that right and not from the time when he first decides to enforce that right No authority has been cited before us to support the view of Venkatasubba Rao, J

That leaves us with the view for which there is abundant authority and which, it may be said, has been in a way approved by the Judicial Committee, namely, that time begins to run from the knowledge of the fraudulent nature of the transfer This is the view of Madhavan Nair, J, in *Narasimham v Narayana Rao*[2], referred to above, and the view taken in *Lal singh* v *Jaichand*[3], *Venkateswara Aiyar* v *Somasundara Chettiar*[4], and *Chinnaturai Muthirian* v *Official Receiver, Trichinopoly*[5]

In *O R M O M SP Firm* v *Nagappa Chettiar*,[6] the question was as to the article of the Limitation Act applicable to a suit to recover trust property from a person who had taken it with notice of the trust by a transaction which was a breach of trust and it was held that Article 120 applied to such a suit The question then arose, from what date time began to run? In that case the breach of trust consisted in the appropriation of trust moneys held by a banker with notice of the

1 (1909) 19 M L J 747 I L R 33 Mad 205
2. (1925) 22 L W 592.
3. (1930) I L R 12 Lah 262.
4 (1917) 7 L W 280 (1918) M W N 244
5. (1943) 1 M L J 125
6 (1941) 1 M L J 393 L.R. 67 I A. 448. I L R, 1941 Mad. 175 (P.C.)

trust towards the discharge of an overdraft of the trustee in his personal capacity This appropriation was on 10th February, 1920 The suit was filed on 29th April, 1933, by two brothers of the trustee, who had committed the breach of trust, challenging this transaction It was alleged in the plaint that the plaintiffs came to know of the breach of trust sometime in 1929 After holding that the article applicable is Article 120, their Lordships of the Judicial Committee proceed to say as follows

"The question is whether time began to run from 10th February, 1920 or from the date in 1929, when the plaintiff came to know that the money of the charities was set off against Subramaniam's debt to the appellant bank upon his overdraft The suit having been brought in 1933 it is necessary for the plaintiff to be able to calculate the time from the later date The language of Article 120 makes no reference to the knowledge of the plaintiff and is in this respect in contrast with that of other articles *e g*, 90, 91, 92, 95, 96, 114 On the other hand it was recognised by the Board in *Mt Bolo* v *Mt Koklan*,[1] that an infringement of the plaintiff's right or at last a clear and unequivocal threat to infringe it is necessary before time begins to run against the plaintiff under the article The Appellate Bench acted upon a principle which has been accepted as applicable to this article in a number of cases in several of the High Courts, *Venkateswara Iyer* v *Somasundaram Chettiar*[2], *P Visvanatham* v *P Narayanadas*[3], *Lalsingh* v *Jaichand*[4], *Mathura Singh* v. *Ramarudra Prasad Sinha*[5] and *Basavayya* v *Bapannarao*[6] In the last mentioned case it was said that in cases in which the relief is sought on the ground of fraud, misconduct, mistake etc, it would appear that limitation is made to commence from the time when the fraud, misconduct or mistake becomes known to the paintiff Such articles as 90, 91, 92, 95 and 96 were mentioned by way of illustration of this principle and it was considered that Article 120 being an omnibus one the general expression employed in column 3 is necessitated by the variety of suits coming within its purview in some only of which would fraud, misconduct or mistake be part of the cause of action It was accordingly held that it would be in consonance with the scheme of the Act if the right to sue should be deemed to accrue under Article 120 from the time of the plaintiff's knowledge of the fraud, misconduct or mistake, where such a ground was the basis of the suit Their Lordships can see some difficulties in this reasoning as a matter of interpretation of the language of the statute and had the matter been *res integra* they are not certain that this interpretation would have prevailed with them But the decisions in India have established a rule of limitation under Article 120 by which the plaintiff in the cases to which the rule applies cannot be debarred of his remedy unless with knowledge of his rights he has been guilty of delay The decisions which have been referred to were given in cases where the plaintiff sought to set aside a decree passed against him when a minor owing to the negligence of his guardian, or a mortgage of property which belonged not to the mortgagor but to a temple, or a transfer by a debtor to defeat his creditors"

It is important to note that a suit by a creditor to set aside a transfer by a debtor intended to defeat his creditors is also specifically referred to as a suit coming within the scope of the rule.

So far, the matter is fairly free from difficulty But then, several questions arise. What is the nature and extent of the knowledge that will start the running of time? In a case like the present filed by the Official Receiver, is it the knowledge of the Official Receiver that is relevant, or, is it the knowledge of the creditors? If it is the knowledge of the creditors, does time begin to run from the earliest date on which any of the creditors had knowledge or from the date on which the last of the creditors had the knowledge?

It has now been established that the Official Receiver can file a suit under section 53 of the Transfer of Property Act It can also be taken as established that the inaction of one creditor who might have knowledge of the fraudulent nature of the transaction would not itself bar another creditor who subsequently came to know of it. In *Lalsingh* v. *Jaichand*[4], it was held that the inaction of one creditor could not bar the general body of creditors and that the right under section 53 of the Transfer of Property Act was an individual right though when it was exercised it enured for the benefit of the general body of creditors. The ruling in *Muruga Chetti* v. *Rajaswami*[7], supplies a similar principle. At page 822 the learned Judges say with reference to a suit filed by certain representatives of a community for a declaration that the suit properties were trust properties and that the alienation of the same was not valid and binding on the community, as follows :

1. (1930) 59 M L J 621: L R 57 I.A. 325: I.L.R 11 Lah. 657 (P C).
2. (1917) 7 L W 280
3. A.I.R. 1928 Mad. 837.
4. (1930) I.L.R. 12 Lah. 262.
5. (1935) I L R 14 Pat. 824.
6. (1930) 58 M.L.J. 349.
7. (1915) 29 M.L.J. 574.

"Following *Tirumal Rao* v *Tungamma Shettithi*[1], to which one of us was a party we hold that the cause of action for a declaratory suit based on a denial of title does not arise until the plaintiff has knowledge of the denial Mr T R Ramachandra Aiyar argues, however, that some of the members of the community had knowledge at the date of the sale deed as they were parties to it In our opinion the knowledge of some of the members cannot affect the right of the others"

The learned Judges in *Narasimham* v *Narayana Rao*[2], also took the same view. Venkatasubba Rao, J, says at page 601 the following

"An individual right is conferred upon each creditor by this section and the inaction or laches of one cannot deprive others of their rights"

Madhavan Nair, J., says at page 606 :

"In view of the fact that a few of the creditors in this case knew of the fraudulent character of the alienation in 1909, i e, more than six years before the suit, it becomes necessary to consider whether the creditors' right of suit under section 53 is an individual right which each individual creditor has or whether it is only a representative right in the sense that if one creditor is barred by limitation from bringing the suit, the others are also barred I agree with my learned brother in thinking that the right of suit under section 53 is an individual right which each creditor has It is true that if a creditor obtains a decree in a suit under section 53, that decree accrues to the benefit of the other creditors as well, but I think section 53 confers on each of the creditors the right of bringing a suit on his own behalf As the receiver represents the whole body of the creditors and as some at least of the creditors knew that the suit mortgage deed was a collusive document only within six years of the suit, I hold the suit by the receiver is not barred by limitation"

No doubt this decision was before the Amendment of 1929. But we consider that the amendment does not affect the question In short, while the action of any one of the creditors may bind the other creditors, his inaction will not adversely affect the others. We are also inclined to be of opinion that in a case where the plaintiff is an officer of Court like the Official Receiver, though he no doubt represents the body of creditors, it is *his* knowledge that should be taken into consideration rather than the knowledge of this or that creditor which might or might not have reached the Official Receiver. No doubt, a change of the office-holder should be disregarded for this purpose and the plaintiff should be considered to be the Official Receiver as such.

Then remains the point which has given us some difficulty and on which counsel on either side have been unable to cite any direct decision, *viz*, the nature and extent of the knowledge. But we consider it useful to refer to cases under Articles 91 and 95 as cases falling under the same category and governed by the same principle The principle is, that in cases governed by specific articles like 90, 91, 92, 95, etc., as well as in cases which may fall within the residuary Article 120, but resemble them, the facts and circumstances which vitiate a transaction or render it voidable are not apparent on the surface of the document evidencing the transaction Other facts and circumstances not so appearing have to be discovered or come to light before the truth is apprehended These are all cases in which what is apparent is not the real. Phillips, J, dealing with a suit under section 53 of the Transfer of Property Act, says in *Venkateswara Iyer* v. *Somasundaram Chettiar*[3] :

"If such a suit coming within Article 120 is based on fraud, the time when the right to sue accrues must, I think, be determined in consonance with the principle governing the other specific suits based on fraud, and that is, that the time when the fraud becomes known becomes the starting point for limitation."

Obviously, knowledge of the existence of a document transferring the property of the debtor is not enough. There should be knowledge of facts from which an inference can be drawn that the transfer is with an intent to defeat or delay the creditors That knowledge cannot, of course, be expected to comprise all the facts and circumstances which may, during the course of an elaborate trial, be brought out, but there must be knowledge of facts which would reasonably lead to a definite conclusion and not such as would merely raise a bare suspicion. In *Indranath Banerjee* v. *Rooke*[4], the plaintiff instituted a suit against the defendants for setting aside a lease which he alleged he had been induced to grant to the first

1. (1914) 1 L W. 134.
2. (1925) 22 L.W. 592.
3. (1917) 7 L.W. 280 at p. 283.
4. (1909) I.L R. 37 Cal. 81.

defendant under fraudulent representations made to him by his agent, the second defendant, who had received a bribe of Rs 500 from the first defendant The lease was dated 28th June 1898, and the suit was instituted in 1907 It was admitted by the plaintiff that even shortly after the execution of the lease he had reason to suspect that the lease had been obtained by fraud But it was asserted that the payment of the bribe came to his knowledge in May 1906 owing to disclosures made in the course of the evidence given by certain witnesses in another suit. It was held that the suit was not barred as the plaintiff must be deemed to have had knowledge of fraud only in 1906 Richardson, J, dealing with this point observes at page 85,

"Mr Rooke admits that shortly after the execution of the lease of the 31st September, 1899, he had reason to suspect that the lease had been obtained by fraud, but he says in effect that he had no certain information on the subject on which he could act before the disclosures of April and May 1906 We think that this is a good answer to the objection under consideration Mr Rooke had no substantial ground to go upon until he came to know of the payment which had been made to Bejoy, and until then it appears to us that the fraud alleged did not become known to Mr Rooke within the meaning of Article 95 Mere suspicion is not knowledge"

The case reported in *Moidiyan's son Punnayil Kuttu* v *Raman Nair*[1], illustrates this principle, namely, that a fact, which might make the plaintiff suspect the *bona fides* of a transaction may not, however, lead him necessarily to the positive conclusion that the transaction is fraudulent There *A*, fraudulently representing to *B*, to whom he was indebted, that a sum of money was due to him from *C*, induced *B* to take an assignment of the alleged debt due from *C* in satisfaction of his debt. In a suit by *B* as assignee against *C*, the latter in his written statement denied the existence of any debt due to *A* and *B's* suit was dismissed after trial on the ground that *C* owed nothing to *A* *B* filed a suit to recover from *A* damages on the ground that *A* had by fraudulent representation induced *B* to take the assignment It was contended for the defendant that time began to run from the date of the written statement in the prior suit by *B* against *C* in which *C* definitely denied the existence of the debt as that must have made the plaintiff suspect the fraud of *A* But the contention was overruled and it was held that the fraud must be held to have been discovered only when the Court found that no debt was due As the Judicial Committee point out in *Rahimbhoy Habibhoy* v *Charles Agnew Turner*[2], it is not enough to show that some "clues and hints" reached the plaintiff which "perhaps, if vigorously and actually followed up, might have led to a complete knowledge of the fraud" There must be something more

Ultimately, the whole question resolves itself into a question of pure fact depending upon the circumstances and the probabilities of each particular case (vide *Krishnan* v. *Sridevi*[3]) In the present case it is said that every fact from which an inference of fraud could be drawn was known or must have been known to the Official Receiver long prior to six years before the institution of the suit This contention is chiefly based upon proceedings relating to two prior insolvency petitions in 1932, namely, I P No. 8 of 1932 and I P No 20 of 1932, which have been mentioned earlier but, it is necessary now to deal with them in some detail

In I P No. 8 of 1932, Sub-Court, Devakottah, filed by Chinnayya Servai, one of the acts of insolvency alleged was the execution of the mortgage in question The petitioner alleged that the said document was a sham and nominal transaction and in any event a fraudulent preference intended to defeat and delay the petitioner and other creditors This petition was dismissed on 9th April, 1934. From the portion of the order relating to this mortgage it becomes evident that though in the petition it was alleged that the mortgage was a sham and nominal transaction, at the trial the petitioner wanted to maintain only that it was a fraudulent preference Beyond a registration copy of the mortgage no documents were filed and the petitioner was the only witness on his side It was apparently admitted on behalf of the peti-

1 (1907) 18 M L J 19 I.L R 31 Mad 230.
2. (1892) L R 20 I A 1 I.L.R. 17 Bom 341 at p. 346 (P C).
3 (1889) I.L R 12 Mad 512 at p. 516 (P C)

tioner that the debts which purported to form the consideration for the mortgage were true It was held that a mere transfer of property to one of several creditors is no preference over other creditors unless the dominant intention of the debtor was to give advantage to that particular creditor and thereby defraud others The Court held that the petitioner had not discharged the burden which lay on him

The other petition, I P No 20 of 1932, filed by Muthukaruppan Chettiar, contained the following allegation in paragraph 5 :

> "With intent to defeat the petitioner and other creditors the respondent has mortgaged his dwelling house at Kottaiyur for Rs 52,101-1-6 on 29th January, 1932"

At the trial the only witness examined on behalf of the petitioner was the petitioner's agent and the Court found that he knew nothing personally of the transaction evidenced by the mortgage in question In fact, a perusal of the order on this petition clearly shows that there was not even the slightest attempt made to sustain the allegation in the petition There is nothing which came out at the trial that could even make any one suspect the honesty of the transfer We find ourselves unable to say that a mere perusal of these proceedings was sufficient to impress the Official Receiver with knowledge of the fraud.

The following is the allegation made in the present plaint in regard to the cause of action :

> "Cause of action for this suit arose in or about the 12th December, 1939, when the public examination of the insolvent in I P No 29 of 1935, on the file of this Court was completed and when the real facts and circumstances relating to the mortgage, dated 29th January, 1932 and the fact that it was executed at Chidambaram came to light to the creditors of the said insolvent"

The Official Receiver himself has given evidence as P W 1 as follows

> "Only after the examination I came to know that there were sufficient circumstances to impeach the mortgage as fraudulent"

In these circumstances we consider that the well-established rule should apply, namely, that it is incumbent on the defendant to show that the plaintiff "had clear and definite knowledge of the fraud at a time which is too remote to allow him to bring the suit" (Vide *Rahimbhoy Habibhoy* v *Charles Agnew Turner*[1], *Venkateswara Ayyar* v *Somasundaram Chettiar*[2] and *Krishnan* v *Sridevi*[3]) The present suit was filed on 24th February, 1943 It must therefore be shown by the defendants that the Official Receiver knew such important facts as would necessarily lead him to draw an inference of fraud some time before 24th February, 1937 The adjudication itself was on 14th July, 1936, and the diary kept by the Official Receiver shows that the insolvent was not co-operating properly and rendering assistance to the Official Receiver In fact, only two of his account-books were produced early in September, 1935, and the other account books, about 111, were filed very much later There is nothing in the notes paper of the Official Receiver to suggest that at any time prior to February, 1937, any facts in respect of this mortgage came to his notice Hi subsequent conduct, namely, his application in October, 1940, for leave to file a petition under section 4 of the Provincial Insolvency Act, also indicates that it was only after the public examination that he had clear and definite knowledge of facts leading to a conclusion of fraud It may well be that proceedings of the prior insolvency petitions might have led the Official Receiver to think that the mortgage was supported by consideration and that possibly it was only a case of a fraudulent preference, in which case no suit would lie under section 53 of the Transfer of Property Act It is not unreasonable to suppose that it was only after a perusal of the account-books and the public examination at length of the insolvent in 1939 that facts entitling him to institute a suit became known to him The defendant have not been able to prove anything to the contrary

It is clear that Muthukaruppan Chettiar is one of the prominent creditors financing the suit It is well known that the Official Receiver often does not take the risk of a litigation unless a creditor or the body of creditors is willing to take the financial burden It may also be that this creditor had all along the suspicion that

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1 (1892) L R 20 I A. 1 I L R 17 Bom 341 (P.C.).

2 (1917) 7 L W 280 at 283

3. (1889) I L.R. 12 Mad. 512 at 516 (P.C.)

this was not a straight transaction. But all this cannot have any bearing on the question of limitation with which alone we are now concerned

Two of the creditors came and deposed as P Ws 2 and 3 that they did not know of the suit mortgage till recently. We are not disposed to attach much weight to their testimony The question is not if any of the creditors or the Official Receiver knew of the existence of the mortgage but whether the Official Receiver knew the facts which would necessarily lead him to infer that the mortgage was a fraudulent transfer.

We hold that the suit cannot be held to be barred by limitation The decree of the Subordinate Judge is set aside and the suit is restored to his file to be tried on the other issues. Costs of this appeal shall abide the result The appellant shall be entitled to a refund of the court-fee paid on the memorandum of this appeal

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Sri Rajah Ravu Venkata Mahipathi Gangadhara Rama Rao Bahadur, Yuvarajah of Pithapuram, represented by the Trustee Maharajah of Pithapuram, and another .. *Applicants**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), sections 2 (1) and 4 (3) (viii) and Madras Permanent Settlemen Regulation (XXV of 1802)—Income derived from permanently settled estate—Imposition of income-tax in respect of—Not a breach of the Madras Permanent Settlement Regulation—'Agriculture'—Meaning of—Income derived from forests of spontaneous growth and trees which have grown wild—Not agricultural income

The imposition of income-tax in respect of income other than agricultural income derived from a permanently settled estate would not be a breach of the Madras Permanent Settlement Regulation

Prabhatchandra Barua v *King Emperor*, (1930) 59 M L J. 814 L R 57 I A 228 I L R 58 Cal 430 (P C), followed

Chief Commissioner of Income-tax v *Zamindar of Singampatti*, (1922) I L R. 45 Mad. 518 (F B), hdle to be impliedly overruled by the above decision of the Privy Council

The word "agriculture" implies something which is achieved with the aid of human agency. Income derived from trees which have grown wild cannot be legitimately described as agricultural income and to describe it as such would involve a distortion of the meaning of the word "agriculture".

Case stated to the High Court by the Income-tax Appellate Tribunal, Madras Branch, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 Act (VII of 1939) in Application No. 66 R A No 48 (Madras) of 1944-45 on its file for decision on the following two questions of law, *viz.* .

"(1) Whether the imposition of income-tax in respect of income derived from a permanently settled estate would be a breach of Regulation No XXV of 1802 relating to Permanent Settlement?

(2) Whether the income of Rs 7,612 derived from the sale of wood, etc (as detailed herein above) is exempt under section 4 (3) (*viii*) read with section 2 (1) of the Indian Income-tax Act of 1922?"

Ch. Raghava Rao for Applicants

C. S Rama Rao Sahib for Respondent.

The Court delivered the following

JUDGMENT —The assessees are the sons of the Maharajah of Pithapuram, the proprietor of the Zemindari of Pithapur which was permanently settled under the Madras Permanent Settlement Regulation (Madras Regulation XXV of 1802). They are the joint proprietors of an estate settled upon them by their father. The estate which formed part of the Zamindari of Pithapur includes certain forests from which the assessees derive income by the sale of wood, bark, leaves, other usufruct of trees, minor forest produce and license fees. They supplement this income by the sale of trees in non-forest areas of the estate held by them. It is admitted that the trees in the forest and non-forest areas have grown wild and that agricul-

*Case Referred No. 9 of 1945. 10th December, 1945.

tural operations are not carried on in any of the areas For the year of account, 1941-42, the income from these sources amounted to Rs 7,612, and the assessees were taxed on this sum for the year 1942-43 They maintained that they were exempt from taxation for two reasons In the first place they said that the income was derived from the produce of a permanently settled estate which was free from all taxation, other than that imposed by way of *peishkush*, by reason of the provisions of the Madras Regulation In the second place they contended that the income was agricultural income within the meaning of section 2 (1) of the Indian Income-tax Act, 1922, and as such is exempt from income-tax by reason of section 4 (3) (*viii*). The Income-tax Officer rejected both these pleas. His decision was upheld by the Appellate Assistant Commissioner and by the Income tax Appellate Tribunal. At the request of the assessees, the Tribunal has, under section 66 (1) of the Income-tax Act, referred for the opinion of this Court two questions. The tribunal has worded them as follows .

> "(1) Whether the imposition of income-tax in respect of income derived from a permanently settled estate would be a breach of Regulation XXV of 1802 relating to Permanent Settlement
>
> (2) Whether the income of Rs. 7,612 derived from the sale of wood etc. (as detailed herein above) is exempt under section 4 (3) (viii) read with section 2 (1) of the Indian Income-tax Act, 1922."

The words "as detailed herein above" mean of course as detailed in the order of reference.

In *Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*[1], a Special Bench of three Judges of this Court held that income from a permanently settled estate was exempt from all taxation beyond the *peishkush* payable to Government. The precise question in that case was whether the income from forests and fisheries was agricultural income and therefore not chargeable to income-tax The Court did not decide whether such income came within the definition of agricultural income, although it would appear that the learned Judges were inclined to the view that it was. They based their decision on the broad ground that the Madras Regulation and the sanad issued to the Zamindar precluded further taxation by the Government. The sanad followed the provisions of the Regulation In the present case, the sanad has not been produced, but it may be taken that it was also in accordance with the Regulation.

If the decision in *Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*[1] stood alone we should be bound to answer the first question referred in favour of the assessee ; but it does not stand alone. There is a judgment of the Privy Council of later date which has direct bearing. It was delivered in *Prabhatchandra Barua* v. *King-Emperor*[2], where the same question arose with reference to the Bengal Permanent Settlement Regulation (Bengal Regulation I of 1793) Their Lordships pointed out that while that Regulation contains assurances against any claim to an increase of the *jama*, based on an increase of the zamindari income, no promise is given in it that a zamindar shall in respect of the income which he derives from his zamindari be exempt from liability to any future general scheme of property taxation, or that the income of the zamindari shall not be subjected with other incomes to any future general taxation of incomes

The Bengal Regulation is differently worded from the Madras Regulation, but they are both to the same effect. Article 4 of the Bengal Regulation reads as follows .

> "The Governor-General in Council accordingly declares to the zamindars, independent talookdars and other actual proprietors of land with or on behalf of whom a settlement has been concluded under the Regulations abovementioned, that at the expiration of the term of the settlement no alteration will be made in the assessment which they have respectively engaged to pay, but that they, and their heirs, and lawful successors, will be allowed to hold their estates at such assessment for ever"

The Madras Regulation opens with this statement :

> "Whereas it is known to the zamindars, mirasdars, raiyats and cultivators of land in the territories subject to the Government of Fort St George that from the earliest until the present period

1. (1922) I L R 45 Mad 518 (F.B). I.L.R. 58 Cal. 430 (P.C).
2. (1930) 59 M.L J. 814 : L.R. 57 I.A. 228

of time the public assessment of the land-revenue has never been fixed, but that, according to the practice of Asiatic Governments, the assessment of the land-revenue has fluctuated without any fixed principles for the determination of the amount, and without any security to the zamindars or other persons for the continuance of a moderate land-tax, that, on the contrary, frequent inquiries have been instituted by the ruling power, whether Hindu or Muhammadan, for the purpose of augmenting the assessment of the land revenue, that it has been customary to regulate such augmentations by the inquiries and opinions of the local officers appointed by the ruling power for the time being, and that in the attainment of an increased revenue on such foundations, it has been usual for the Government to deprive the zamindars, and to appoint persons on its own behalf to the management of the zamindaris, thereby reserving to the ruling power the implied right and the actual exercise of the proprietary possession of all lands whatever, and whereas it is obvious to the said zamindars, mirasdars, raiyats and cultivators of land that such a mode of administration must be injurious to the permanent prosperity of the country by obstructing the progress of agriculture, population and wealth, and destructive of the comfort of individual persons by diminishing the security of personal freedom and of private property, wherefore, the British Government, impressed with a deep sense of the injuries arising to the State and to its subjects from the operation of such principles, has resolved to remove from its administration so fruitful a source of uncertainty and disquietude, to grant to zamindars and other landholders, their heirs and successors, a permanent property in their land in all time to come, and to fix for ever a moderate assessment of public revenue on such lands, the amount of which shall never be liable to be increased under any circumstances"

In the clauses which follow effect is given to this declaration

In *Prabhatchandra Barua* v *King-Emperor*[1], the Judicial Committee held that the zamindar of a permanently settled estate is assessable to Indian income tax in respect of the income, profits and gains derived from his zamindari, subject to the exemptions provided in section 4 (3) of the Act The assessment should be computed after making proper allowance under section 12 (2) in respect of the *jama* assessed and paid Their Lordships affirmed the decision of the Calcutta High Court that the following items of the income derived by the appellant from his zamindari were not agricultural income and therefore not exempt from income-tax by section 4 (3) (*viii*)

"(*i*) Jalkar or rents received from fisheries

(*ii*) Ground-rent from land used for potteries

(*iii*) Ground-rent from land used as brickfields

(*iv*) Fees received from the tying up of boats against the assessee's land

(*v*) Fees received from land used for storing purchases of crops (paliali)

(*vi*) Fees received from cart-stands

(*vii*) *Punyaha nazar* or *nazar* paid by tenants of agricultural holdings at the beginning of the zamindari year

(*viii*) *Nazar* for petition presented to the zamindar, dealing with questions of succession, settlement and partition of agricultural holdings

(*ix*) Ground-rent for permanent shops at *hauts* and *bazars*

(*x*) Stall fees paid by temporary (daily) sellers at *hauts* and *bazars*"

The learned counsel for the assessees has not been able to advance any reason why this Court should not apply the decision in *Prabhatchandra Barua* v *King-Emperor*[1] to the Madras Regulation If the Bengal Regulation permits of the profits and gains of a zamindari, other than those derived from agriculture, being assessed to income-tax, the same considerations must apply to the Madras Regulation We hold that their Lordships' judgment impliedly overrules the judgment of this Court in *Chief Commissioner of Income-tax* v *Zamindar of Singampatti*[2], and accordingly we answer the first question by saying that the imposition of income-tax in respect of income other than agricultural income derived from a permanently settled estate would not be a breach of the Madras Regulation

We have now to decide whether the income derived from forests of spontaneous growth and from trees which have grown wild in non-forest areas represents agricultural income within the meaning of the definition given in section 2 (1) of the Income-tax Act As we have indicated, the learned Judges who decided *Chief Commissioner of Income-tax* v *Zamindar of Singampatti*[2] were inclined to the view that income from forests and fisheries would be agricultural income, although they did not decide this question It is very difficult to see how income from fisheries could be classified as agricultural income. In fact the decision of the

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1 (1930) 59 M L J 814 L R 57 I A. 228 : I.L.R. 58 Cal. 430 (P.C.).

2 (1922) I L R. 45 Mad 518 (F.B.)

Privy Council in *Prabhatchandra Barua* v *King-Emperor*[1], shows clearly that it cannot be so classified Their Lordships did not, however, have to consider whether income from forests or individual trees of spontaneous growth comes within the definition and therefore it is necessary to examine the question for ourselves in the light of the reported cases which have bearing on it

In the *Province of Bihar* v *Maharaja Pratap Udai Nath Sahi Deo*[2], the Patna High Court held that the income derived from wild jungle fruits was not income derived from land used for agriculture or from agriculture and therefore was not assessable to income-tax under the Bihar Agricultural Income-tax Act, 1938

In *Kaju Mal* v *Salig Ram*[3], the Lahore High Court held that a stretch of natural forest which did not lie within a village site was exempt from pre-emption under the Punjab Pre-emption Act, 1905, as it was not agricultural land or land used for purposes subservient to agriculture and this decision was upheld by the Judicial Committee in *Kaju Mal* v *Salig Ram*[4] Of course, what is agriculture within the meaning of the Indian Income-tax Act may not be agriculture within the meaning of another Act, as my learned brother pointed out when delivering the judgment of this Court in *Sarojinidevi* v *Subramaniam*[5], but we think that the Lahore case does render material assistance in deciding the question now before us

Another judgment of the Privy Council which has bearing is that delivered in *Kesho Prasad Singh* v *Sheo Prasad Oja*[6] The question there was whether a mango grove was land used for agricultural purposes within the meaning of section 79 of the Agra Tenancy Act, 1901, and it was held that it was not

The Oxford Dictionary defines " agriculture " as " the science and art of cultivating the soil, including the allied pursuits of gathering in the crops and rearing live-stock, tillage, husbandry, farming (in the widest sense) " The word " agriculture " implies something which is achieved with the aid of human agency. In our judgment, income derived from trees which have grown wild cannot legitimately be described as agricultural income In inclining to the opinion that income from forests was agricultural income, the learned Judges who decided *Chief Commissioner of Income-tax* v *Zamindar of Singampatti*[7], were obviously influenced by the opinion which they had formed on the main question, namely, that no other tax beyond that involved in the payment of *peishkush* could be levied on income derived from a permanently settled estate There is ample authority for holding that income derived from trees which have grown wild is not agricultural income, but without the aid of authority, we should have no hesitation in saying that to describe it as such would involve a distortion of the meaning of the word " agriculture".

We answer the second question referred by saying that the Rs 7,612 does not represent agricultural income and is taxable.

As both the questions have been answered against the assessees, they must pay the costs of the reference which we fix at Rs. 250.

V S. *Reference answered.*

[PRIVY COUNCIL.]

(On appeal from the Chief Court of Oudh)

PRESENT —LORD THANKERTON, LORD GODDARD AND SIR JOHN BEAUMONT.

Babu Anand Behari Lal *Appellant**

v.

Messrs Dinshaw and Co , Bankers, Ltd , Lucknow *Respondent.*

Evidence Act (I of 1872), section 65—Conditions to be fulfilled for the admission of secondary evidence—Principal of power of attorney not produced—No satisfactory proof of its disappearance, or the impossibility of producing it—Secondary evidence not admissible

1 (1930) 59 M L J 814 L R 57 I A 228 I.L R 58 Cal 430 (P C)
2 (1941) I L R 20 Pat 699 (S.B.).
3 A.I R 1919 Lah 222 (2)
4. (1923) 46 M L J 536 L R. 51 I A. 11 I L.R 5 Lah 50 (P C)
5 I L R (1945) Mad 61 (1944) 1 M L J. 361
6 (1924) 47 M L J 824 L R 51 I A. 381 I L R. 46 All 831 (P C)
7 (1922) I.L R 45 Mad 518 (F B).

* P. C. Appeal No. 36 of 1943. 25th October, 1945

Where the principal of a power of attorney is not produced and its disappearance, or the impossibility of producing it is not satisfactorily proved, the conditions are not fulfilled under which section 65 of the Evidence Act provides that secondary evidence may be admitted

Where the secondary evidence relied on was an extract of an alleged power of attorney purporting to have been found in the Bank books of the Imperial Bank and there was no attempt to prove who the writer of the extract was and the writer was not produced to say that it was a correct copy,

Held, that even if it was admissible, it was not proved

Appeal from a judgment and decree of the Chief Court of Oudh* at Lucknow, dated 7th April, 1942.

Sir Herbert Cunliffe, *K C.* and *R. K. Handoo* for Appellant.

C S Rewcastle, *K. C.* and *S. P. Khambatta* for Respondent

Their Lordships' Judgment was delivered by

LORD THANKERTON.—The present appeal arises out of an application by the present appellant for permission to proceed in the liquidation under section 171 of the Indian Companies Act with an application in which he or his predecessor applied to have his name substituted for that of the respondent Bank in a preliminary mortgage decree.

The whole warrant for that application was based on an assignment alleged to have been made by the respondent Bank in favour of the appellant prior to the date of liquidation That document, on the face of it, shows that it was not signed by any director or official of the Bank. It shows, further, as far as one can see, no signature on behalf of the Bank

Issue No. 5 which has been considered and as to which concurrent findings have been made by the Courts in India raises a question of the authority of Balakram to act on behalf of the Bank. That was based on an alleged power of attorney by the Bank in favour of Balakram. The principal of the power of attorney has not been produced and its disappearance, or the impossibility of producing it, in the view of the Courts in India, has not been satisfactorily proved. Therefore, the conditions have not been fulfilled under which section 65 of the Indian Evidence Act provides that secondary evidence may be admitted.

Further, it may be added that the secondary evidence relied on is an extract of an alleged power of attorney purporting to have been found in the Bank books of the Imperial Bank. It is not attempted to prove who the writer of that extract was and the writer is not produced to say it was a correct copy Even if it was admissible it is not proved, and as has been found by both Courts in India, it is not proved that Balakram had authority from the directors and even assuming under the Companies Act they would be entitled to delegate this particular authority, their Lordships do not trouble with the evidence of Balakram because it is inconsistent and unreliable, clearly.

Sir Herbert Cunliffe, on behalf of the appellant, sought to raise another issue. The issue, as their Lordships understand it, is based on ratification or estoppel. Both these issues are questions of fact which were not in issue at the trial, and are raised for the first time before their Lordships . It is too late to raise any such question at this stage.

Accordingly, it is unnecessary to deal with the other questions arising in the case because on these concurrent findings, the justification for the application had disappeared from the case. The result is that the appeal must be dismissed, the judgment of the Court below be affirmed and the appellant must pay the respondents' costs.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Hy. S. L. Pollock & Co.*

Solicitors for Respondent: *T. L. Wilson & Co.*

V S. —— *Appeal dismissed.*

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* A.I.R. 1924 Oudh. 417.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore)

PRESENT.—LORD GODDARD, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Chainchal Singh .. *Appellant**

v

King-Emperor . *Respondent.*

Evidence Act (I of 1872), section 33—Admission of previous statement of witness—Witness incapable of giving evidence—Recourse to section 33—Strict proof of incapacity necessary—Duty of Court—Consent of party—If and when can dispense with such proof—Physical incapacity—Medical evidence—If always necessary—Privy Council practice—Interference on ground of misreception of evidence—Principle governing

Where it is desired to have recourse to section 33 of the Evidence Act for the admission of a previous statement of a witness on the ground that he is incapable of giving evidence, that fact must be proved, and proved strictly It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the Court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the Court, and it is only by a statutory provision that this can be achieved But the Court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved In a civil case a party can, if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence The fact of the counsel of the accused consenting to the evidence of a witness being read under section 33 in the Sessions Court, cannot do away with the necessity of the Court being satisfied by proof

It cannot be said that in every case there must be evidence of a medical man, where excuse is sought on the ground of physical incapacity. That is not the law in England and there is no reason for a different rule in India There may be many cases in which the facts are such that the incapacity can be proved by a lay witness

Where the only evidence as to the physical incapacity of a witness was that of a police officer who served the summons to the effect that he found the witness ill and unable to move from his house and that he was suffering from tuberculosis,

Held, that the police officer was not a proper person to prove from what disease the witness was suffering, he could only say what some one told him Hence the admission of the previous statement of the witness on the strength of such evidence would be wrong

Before their Lordships of the Judicial Committee would advise His Majesty to allow an appeal in a criminal case on the ground of misreception of evidence, they would require to be satisfied that grave and substantial injustice has been caused thereby

A G P Pullan for Appellant.

B. MacKenna for Respondent.

Their Lordships' Judgment was delivered by

LORD GODDARD.—This is an appeal by special leave from a judgment of the High Court of Lahore dismissing an appeal by the appellant from a conviction for murder by the Additional Sessions Judge of Amritsar. The question of law which arises and was the ground on which special leave was given is whether the previous statement of a witness for the prosecution made before the committing Magistrate was properly admitted at the trial under section 33 of the Indian Evidence Act, 1872 While contending that the statement was properly admitted, the Crown submits that even if it ought to have been rejected, there was ample evidence justifying the conviction and that accordingly no grave or substantial injustice has been done. Their Lordships have already stated that they will humbly advise His Majesty that the appeal should be dismissed and now proceed to give their reasons.

The appellant was charged before the learned Additional Sessions Judge along with thirteen others with the murder of one Sohan Singh. The Sessions Judge convicted seven of the prisoners and sentenced them all to death, and acquitted the remaining seven. All the convicted persons appealed, and the High Court upheld the conviction and sentence on the appellant; they upheld the conviction of one other of the prisoners but substituted a sentence of transportation for life for that of death and quashed the convictions of the other appellants The evidence

* P. C. Appeal No. 81 of 1944. 3rd July, 1945.

showed that there was undoubted enmity between the murdered man and the appellant and there is also no doubt but that the former was attacked by a considerable number of persons, some of whom were armed with weapons, that he was killed and his body afterwards disposed of so that no trace of it has been found. It has not, however, been disputed before the Board that there was not ample evidence upon which it could be found that the man was murdered, and the only question was whether the evidence showed that the appellant took part in the murder The murder took place at the Gorewalla well in the village where the murdered man was lying on a cot There were several persons called who alleged they were eye-witnesses Among them was a "patwari," Lachhman Das, who happened to be at the village that night in the course of his duties He was examined before the committing Magistrate and there gave evidence in considerable detail showing that the appellant took a prominent part in the attack on the deceased, and he was cross-examined by counsel for the accused On December 8, 1943, the appellant, along with the other accused persons, was committed for trial to the Sessions which were held on January 19, 1944. On January 6, a summons was served on Lachhman Das ordering him to appear and give evidence at the trial on the 19th. This summons was served upon him by a Police Officer, Ganda Singh. Lachhman Das wrote on the summons:

> "Sir, I am seriously ill and am unable to attend the Court My statement may kindly be recorded at my place of residence"

and gave it to the Police Officer. He did not appear at the trial and the officer was called and his evidence was as follows:

> "I was entrusted with the summons issued for the service of Lachhman Das I found him ill and unable to move from his house He is suffering from tuberculosis I got a report to that effect made by the patwari on the summons"

The Public Prosecutor, on that evidence, applied to have his statement made before the Magistrate transferred to the Sessions file and read, under section 33 of the Evidence Act It appears that counsel for the accused stated that he had no objection to this being done and thereupon the learned Additional Sessions Judge admitted the statement. The material provisions of section 33 are in these words:

> "Evidence given by a witness in a judicial proceeding is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is incapable of giving evidence or if his presence cannot be obtained without an amount or delay or expense which, under the circumstances of the case, the Court considers unreasonable."

Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence, that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the Court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to the reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the Court, and it is only by a statutory provision that this can be achieved. But the Court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved. In a civil case, a party can, if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is capable of giving evidence. In the present case the only evidence was that of the Police Officer already mentioned and his visit was thirteen days before the trial. The officer was not a proper person to prove from what disease the witness was suffering; he could only say what some one told him. If such evidence as he gave were sufficient, it would mean that any reluctant witness could take to his bed when he found there was a likelihood of being served with a witness summons and get excused from attendance by telling the server that he was suffering from some serious complaint. Their Lordships do not mean to lay down that in every case there must be evidence of a medical man, where excuse is sought on the ground of physical incapacity. That is not the law in England see

R. v *Noakes*[1] and there is no reason for a different rule to apply in India. There may be many cases in which the facts are such that the incapacity can be proved by a lay witness There was no evidence at all except that the policeman found the witness was ill thirteen days before the trial and as he was not competent to speak to the illness, their Lordships are of opinion that there was no evidence before the Court that he was incapable of giving evidence of January 19 The learned Additional Judge was no doubt largely influenced by counsel for the accused consenting to the evidence being read, but in their Lordships' opinion that does not do away with the necessity of the Court being satisfied by the proof Neither counsel nor his client could have had any personal knowledge on the subject, unless indeed counsel had recently seen the witness, in which case he could have so informed the Court and not merely given a consent It may be that there are some matters as to which it would be possible for a prisoner to consent to be taken as proved though no strict evidence was given, if there are, as to which their Lordships express no opinion, they could only be such as might reasonably be supposed to be particularly within the knowledge of the accused Their Lordships accordingly consider that this previous statement was wrongly admitted Their Lordships would also observe that though, in this case, the accused was represented before the committing Magistrate and the witness was, therefore, cross-examined, in very many of these cases, the accused is not represented at this stage, so while he has the opportunity to cross-examine, it is not often that this would be effectively done This is another reason for exercising great care before admitting a statement

Next it was contended for the appellant that if the previous statement of Lachhman Das was inadmissible, the appeal must be allowed as it was on that evidence that the High Court relied in upholding the conviction Before this Board will advise His Majesty to allow an appeal in a criminal case on the ground of the misreception of evidence, they require to be satisfied that grave and substantial injustice has been caused thereby In their Lordships' opinion, there was ample evidence to justify a conviction in this case apart from Lachhman Das's statement, and they feel no doubt as to the guilt of the appellant The trial Judge who saw and heard the witness saw no reason to disbelieve the eye-witnesses on the main points in their evidence. It appears to their Lordships that the main reason the High Court had for not accepting their evidence as satisfactory was that it did not accord in all aspects with that of Lachhman Das, and because he apparently did not see the two principal witnesses, Mula Singh and Mangal Singh, at the scene of the murder, to which he himself was not particularly close Considering the number of people who were collected at the spot, either as participants in the attack or as onlookers attracted by the uproar, it is no ground for disbelieving witnesses who have given an apparently reliable account and whose evidence was believed by the trial Judge, that another witness says he did not see them there, as might well be the case Another reason given by the High Court for disbelieving Mula Singh was that he gave as a reason for his presence on the scene that he was suffering from dysentery and had gone to the well to relieve himself The High Court do not believe he would have gone a distance of 600 *karams* for this purpose. But there was no evidence that his house was so far from the well and he denied that it was Moreover, if the statement of Lachhman Das is excluded, it follows that the principal reason given by the High Court for not accepting the evidence of the eye-witnesses, who as has already been said were not disbelieved by the learned Judge, no longer exists Looking at the evidence as a whole, their Lordships entertain no doubt that the appellant took an active part in the murder, and they were accordingly unable to advise His Majesty that there were any grounds for quashing the conviction.

Solicitors for Appellant : *Douglas Grant and Dold*

Solicitor for Respondent : *Solicitor, India Office.*

V.S. — *Appeal dismissed.*

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1. (1917) 1 K.B 581.

.IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE LAKSHMANA RAO.

Nacharammal and others .. *Appellants**

v

Veerappa Chettiar and others • *Respondents.*

Civil Procedure Code (V of 1908), section 48—Period of twelve years—Starting point—Decree to be executed where there has been an appeal and second appeal

Where the plaintiff obtained a conditional decree in a suit which was confirmed on appeal subject to a slight modification and second appeals by both parties were dismissed and the decree-holder filed an execution application within twelve years from the date of dismissal of the second appeals, on a contention that it was barred by section 48 of the Civil Procedure Code,

Held, that as the decree to be executed is that of the appellate Court of final jurisdiction where there has been an appeal, and as the period of 12 years under section 48 has to be computed from the date of such appellate decree, the application was in time

Manavikrama v *Unniappan*, (1891) 2 M L J 23 I L R. 15 Mad 170, *Bhup Indar Bahadur Singh* v *Bijai Bahadur Singh*, (1900) 10 M.L J 290 L R 27 I A 209 I L R 23 All 152 (P C), *Brij Narain* v *Tejbal Bikram Bahadur*, (1910) 20 M L J 587 L R 37 I A 70 · I L R 32 All 295 (P C), and *Jowad Hussain* v *Gendan Singh*, (1926) 51 M L J 781 L R 53 I A 197 I L R 6 Pat 24 at 28 (P C) followed

Nagalinga Chetty v *Srinivasa Aiyangar*, (1941) 1 M L J 365, not followed

Appeal under clause 15 of the Letters Patent against the judgment of the High Court† dated 7th March, 1945, in A.•A A. O No 66 of 1944, preferred to the High Court against the order of the District Court, Madura, dated 9th November, 1943, and made in A. S. No. 55 of 1943 (E. P. No. 105 of 1942, in O S No. 27 of 1920, Sub-Court, Dindigul).

T. Krishna Rao for Appellants

T. V. Muthukrishna Aiyar and *K. Parasurama Aiyar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is one of limitation.

On the 1st December, 1922, in O. S. No. 27 of 1920, in the Court of the Subordinate Judge of Dindigul, the plaintiff obtained a conditional decree for possession of property in suit. On the 28th September, 1926, that decree was confirmed subject to a modification with regard to the amount to be paid under the decree. Both sides appealed to this Court On the 21st November, 1930, their appeals were dismissed On the 13th August, 1942, the decree-holder filed an application for execution The alienees from the first defendant contended that the application was barred by reason of the provisions of section 48 of the Code of Civil Procedure. The Subordinate Judge held that the petition was not barred and his decision was concurred in by the District Judge. On second appeal Kuppuswami Aiyar, J, agreed with the Courts below. This appeal is from his judgment.

The appellants say that section 48 of the Code of Civil Procedure prescribes a period of twelve years from the date of the decree of the trial Court and rely on the decision of a Bench of this Court (Burn and Mockett, JJ) in *Nagalinga Chetty* v. *Srinivasa Aiyangar*[1]. We shall refer to that decision presently

It is a well-settled principle of law that the decree to be executed is that of the appellate Court where there has been an appeal. In *Manavikrama* v *Unniappan*[2], this Court (Muthuswami Aiyar and Parker, JJ.) held that when an appeal has been heard, the decree of the appellate Court becomes the final decree in the suit, and the only one capable of execution. The Privy Council have made similar pronouncements in three later cases, namely, in *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh*[3] *Brij Narain* v. *Tejbal Bikram Bahadur*[4], and *Jowad Hussain* v. *Gendan Singh*[5]. These decisions, except the last one, had reference to the Code of 1882. Section 230 of

* L P A No 38 of 1945 17th December, 1945

† (1945) 2 M L J. 197.

1. (1941) 1 M L J 365

2. (1891) 2 M.L J 23 I L R 15 Mad. 170

3 (1900) 10 M L J 290 L R 27 I A 209. I.L.R 23 All. 152 (P C.).

4 (1910) 20 M.L J 587 · L R 37 I A. 70 : I.L.R 32 All. 295 (P C).

5 (1926) 51 M.L J 781 : L.R. 53 I A; 197 : I.L.R. 6 Pat. 24 (P.C).

that Code corresponds to section 48 of the present Code but was rather differently worded Section 230 of the old Code said *inter alia* that where an application had been made to execute a decree, no subsequent application to execute the same decree should be granted after the expiration of twelve years from the date of the decree sought to be enforced "or of the decree (if any) on appeal affirming the same" In section 48 of the present Code, the starting point is the date of the decree sought to be executed There is no reference to an appellate decree Obviously the alteration in the wording was not intended to make the decree of the trial Court the starting point even if there was an appeal. The omission of the words "or of the decree (if any) on appeal" means merely the omission of unnecessary words. Where an appellate Court passes a decree it takes the place of the decree of the trial Court In *Jawad Hussain* v *Gendan Singh*[1], a decision under the present Code, the Judicial Committee approved of this statement.

"If an appeal is preferred, the final decree is the decree of the appellate Court of final jurisdiction When that decree is passed, it is that decree and only that which can be made final in the cause between the parties"

It is true that Burn and Mockett, JJ, in *Nagalinga Chetty* v *Srinivasa Aiyangar*[2], did express the opinion that the twelve years starts from the date of the trial Court's decree The learned Judges had misunderstood the effect of the judgment of the Full Bench of this Court in *Ramachandra Rao* v *Parasuramayya*[3]. It was there held that where a decree has been amended, the twelve years period does not commence from the date of the amendment but from the date on which the decree was passed It was certainly not the intention of the Full Bench to hold that the period starts from the trial Court's decree when that decree has been replaced by an appellate decree The judgments delivered in that case lend no support for the judgment in *Nagalinga Chetty* v *Srinivasa Aiyangar*[2] in this connection

In the present case, the period of twelve years commenced on the 21st November, 1930, when this Court dismissed the second appeals. Therefore the application for execution was well within time.

The appeal is dismissed with costs.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE PATANJALI SASTRI.

Sri Gangavamsam Satyanarayana .. *Petitioner**

v.

Routu Ramaswaminaidu and others *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938) section 10 (2) (i)—*Applicability—Mortgagee to take possession and enjoy profits in lieu of interest—Contingent stipulation for payment of interest on amount which according to the bargain the mortgagee is authorised to advance and add to the mortgage amount—Exemption under section* 10 (2) (i) *does not apply*

Where a mortgage was executed by way of renewal of an earlier mortgage for a certain sum and for a further sum due under a compromise decree and it was provided that the mortgagee was to take possession of the mortgaged properties and enjoy the rents and profits in lieu of interest, and that in the event of certain specified irrigation sources going into disrepair the mortgagor should pay interest on the excess over a specified sum necessary for the repairs which was payable along with the principal sum as a condition precedent to redemption,

Held, that it was immaterial whether the contingent stipulation for payment of interest was in respect of the amount advanced to the debtor or was in respect of an amount which according to the bargain between the parties the mortgagee was authorised to advance on account of the debtor adding it to the mortgage account In the latter case also, the amount must be regarded as part of the amount due under the mortgage and as such the mortgage was not covered by the exemption under section 10 (2) (i) of the Act and is liable to be scaled down under the provisions of the Act

Jagannatha Aiyangar v *Senni Veera Chettiar*, (1941) 1 M L J 172, followed

1. (1926) 51 M L J. 781 L R. 53 I A. 197 I.L R. 6 Pat. 24 at p. 28 (P C).
2. (1941) 1 M L J. 365
3. (1940) 1 M L J 235 : I L R. (1940) Mad. 349 (F B).

* C. R. P. No. 357 of 1944. 28th November, 1945.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Parvatipur dated 30th October, 1943, and passed in O. P. No. 52 of 1942.

S Sitarama Aiyar for Petitioner.

S Ramamurthy for Respondents.

The Court delivered the following

JUDGMENT —This revision petition arises out of an application made by the petitioner under the rules framed under Madras Act IV of 1938 for a declaration that the debt due by him to the respondent under a mortgage for Rs. 2,000 dated 8th April, 1911, was discharged under the provisions of that Act. The Court below has dismissed the application on the ground that the exemption under section 10 (2) (*i*) of the Act applied to the case and that therefore there was no question of scaling down the debt Hence this Civil Revision Petition.

The bond of 1911 was executed by way of renewal of an earlier mortgage dated the 16th May, 1894, to the extent of Rs 1,000 and for a further sum of Rs. 1,000 due under a compromise decree in O S. No 104 of 1903 The Court below in considering the applicability of section 10 (2) (*i*) to the case has based its conclusion exclusively upon the earlier bond of 1894 and made no reference whatever to the bond to which the provisions of the Act were sought to be applied. This is obviously wrong The question for consideration was whether the provisions of the later bond of 1911 were such as would bring the case within the scope of section 10 (2) (*i*). It is, however, unnecessary to remit the case to the Court below for the consideration of this question as the matter is clear on the terms of this bond It is executed in favour of 7 persons apparently members of a joint family, 3 of whom were parties to the original deed After reciting that the principal advanced under that deed, namely, Rs 1,000 was outstanding and that a further sum had become due under the compromise decree referred to above, it provided that the same lands which were mortgaged under the earlier deed were to be the security for the sum of Rs 2,000 made up as aforesaid The mortgagee was to take possession of the properties and enjoy the rents and profits in lieu of interest. It is also provided that if certain specified irrigation sources for the lands mortgaged required repairs to be effected to the extent of more than Rs 16-4-0 the mortgagor should pay interest on the excess at the rate of 12 per cent. per annum, and such excess amounts together with interest calculated as above should be paid along with the sum of Rs 2,000 as a condition of redemption of the properties by the mortgagors.

It is argued for the petitioner that this mortgage does not fall within the exemption in section 10 (2) (*i*) as it contains a stipulation for payment of interest due to the mortgagee in the contingency referred to above, as even a stipulation for payment of interest in certain events takes the case out of the scope of the exemption I think the contention must be accepted as it is supported by *Jagannatha Aiyangar* v. *Senni Veera Chettiar*[1], which shows that even a contingent stipulation for payment of interest to the mortgagee is sufficient to take the case out of the exemption. Mr Suryanarayana for the respondent, however, urges that the decision referred to above has no application here as the stipulation for interest in that case was in respect of the amount advanced to the debtor, whereas here interest is payable only on the cost of repairs incurred by the mortgagee in excess of a specified sum No doubt the decision admits of that distinction. But it seems to me that it is immaterial whether the contingent stipulation for payment of interest is in respect of the amount advanced to the debtor or is in respect of an amount which according to the bargain between the parties the mortgagee is authorised to advance on account of the debtor adding it to the mortgage amount In the latter case also the amount must be regarded as part of the amount due under the mortgage As already observed, the payment of this amount in addition to the amount of Rs 2,000 is made a condition of redemption and the security granted

1 (1941) 1 M.L.J. 172.

under the deed covers this additional sum. No distinction can, therefore, be drawn for this purpose between the amount originally advanced under the document and the amounts which the mortgagee is authorised to spend on account of the mortgagor on repairs to the irrigation sources It follows that the mortgage in question is not covered by the exemption under section 10 (2) (i) and is liable to be scaled down under the provisions of the Act.

Applying, however, these provisions, it is seen that the petitioner derives no benefit. He has elected to seek relief under section 8 (2) and not under section 8 (1). For the purpose of section 8 (2) it has been decided in *Venkata Siddayya* v. *Sanjappa*[1] that in dealing with a consolidated debt, payments made towards the debts consolidated should be clubbed together and treated as payments towards the consolidated debt Applying section 8 (3) in the light of that decision, it is found that the sums paid under the mortgage during the period it was in force was Rs. 1,700, while twice the amount of the principal as defined in the explanation to the section is Rs. 4,000. The amount payable, therefore, to the creditor will be Rs. 2,300, while according to the provisions of the bond, the petitioner is entitled to redeem the mortgage by payment of Rs 2,000 only, no claim having been made for the cost of repairs. Application of the provisions of the Act to the debt in question does not therefore in any way benefit the debtor.

The application fails on this ground, and the revision petition is dismissed with costs.

V.P.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Karathigundi Keshava Bhatta .. *Appellant**

v.

Sunnanguli Krishna Bhatta .. *Respondent.*

Water rights—Percolating water—Diversion of—Limits to exercise of rights by owner—New pond abstracting water flowing in a surface channel—Adjoining owner entitled to use the water of the channel—Right to relief

Though as a general rule no action lies for the obstruction or diversion of percolating water even if the result of such abstraction be to diminish or to take away the water from a neighbouring well in an adjoining land, there is an exception that in drawing subterranean water from the adjoining field one cannot draw off water flowing in a defined surface channel through that adjoining land

Where a newly dug pond had the effect of tapping and causing a diminution of the water flowing in a defined surface channel which an adjoining owner had a right to use for his lands lower down,

Held, that it was an actionable wrong that must be prevented by the issue of a mandatory injunction directing the filling up or obliteration of the pond so as to secure that the channel water was not abstracted into the pond by percolation

Appeal against the decree of the Court of the Subordinate Judge of South Kanara, in A S. No 280 of 1943, preferred against the decree of the Court of the District Munsiff, Mangalore, in O S. No. 190 of 1939.

K. Y. Adiga and *S Ramayya Nayak* for Appellant.

K. Vittal Rao for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the appellant and the question between him and the plaintiff relates to their respective rights to use the water of a *thodu* or channel passing to the east of their lands The plan Ex P-8 prepared by the Commissioner shows the relative positions of the fields of the plaintiff and the defendant and the *thodu* The lower Courts have restricted the right of enjoyment of the water of this *thodu* by the defendant in accordance with what they considered to be the true meaning of the karar or compromise that was entered into between the parties in the year 1913, Ex P-1 and a decree in O S. No. 393 of 1912, a copy of which

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1. (1943) 1 M L J 321.

* S A No. 2456 of 1944 9th November, 1945

has been marked as Ex. P-4 The defendant does not seem to have any grievance against the decrees of the lower Courts in so far as they restrict him to use the water of the channel for particular lands belonging to him but not for other lands which he has converted into garden after the date of the compromise. His chief complaint is that he has been wrongfully asked to close the pond 'Y' in the field marked G H F E in the Commissioner's plan. A mandatory injunction was issued against him to close this pond on the ground that the water flowing north to south in the *thodu* was abstracted by the pond 'Y' which the defendant had recently dug and that consequently there was a diminution in the supply of the channel water which the plaintiff was entitled to use for his lands lower down.

Mr Adiga urges on the authority of the well-known cases of *Acton* v *Blundell*[1] and *Chasemore* v. *Richards*[2] that this portion of the decrees of the lower Courts is wrong, because the general rule is that the owner of a land has got a natural right to all the water that percolates or flows in undefined channels within his land and that even if his object in digging a well or a pond be to cause damage to his neighbour by abstracting water from his field or land it does not in the least matter because it is the act and not the motive which must be regarded. No action lies for the obstruction or diversion of percolating water even if the result of such abstraction be to diminish or to take away the water from a neighbouring well in an adjoining land. To this general rule an exception has however been incorporated by the decisions in *Grand Junction Canal Co* v. *Shugar*[3] and *English* v. *Metropolitan Water Board*[4], which lay down the proposition that in drawing subterranean water from the adjoining fields a man cannot draw off water flowing in a defined surface channel through that adjoining land Lord Hatherly points out in the first of the two cases that . . "If you cannot get at the underground water without touching the water in a defined surface channel you cannot get at it at all You are not by your operations, or by any act of yours, to diminish the water which runs in a defined channel . . ." In the Law relating to easements in India by Peacock the following passage occurs at page 292 .

"The general rule that a landowner has a natural right to divert or appropriate within his own land, without regard to his neighbour, water percolating or flowing in undefined channels must be taken with this reservation, that if he cannot effect such diversion or appropriation without appropriating water from a stream flowing in a defined channel, he may not do so at all"

This rule based on the two decisions referred to above applies in this country as well and the lower Courts were justified in holding that as the pond 'Y' had the effect of tapping the water flowing in the channel, it is an actionable wrong that must be prevented by the issue of a mandatory injunction.

But the question still remains whether it is necessary to go so far as to direct the defendants to fill up or obliterate the pond altogether or whether it is enough to give instructions to secure that the *thodu* water is not abstracted into the pond by percolation It is in evidence that the pond has got its own springs in the north and west. So a part of the water in this pond is the water to which the defendant is entitled. It is only as regards that part of the water that may come into it by means of percolation from the channel that the plaintiff can say that it should not be allowed. So I think it will be enough to substitute in the place of the mandatory injunction granted by the lower Courts, with reference to the pond 'Y' an injunction directing him so to cover the eastern side of the pond with cement mortar as would prevent water percolating from the channel into the pond. He will carry out this work within three months from this date In default the decree of the lower Court will stand affirmed.

Mr. Adiga raised a new point not taken in the Courts below relating to the amount of Rs 150 awarded as damages He said that the plaintiff could get damages in respect of the fields that were contemplated as entitled to irrigation from the channel water at the time of compromise but that he could not get damages in respect of fields which he might have recently converted into garden lands He pointed

1. (1843) 152 E R 1223 12 M & W. Rep 324.
2. (1859) 7 H.L C. 349
3. (1871) L R 6 Ch A C 483.
4. (1907) 1 K.B 588.

out that while the compromise dealt with the plaintiff's fields of an extent of one acre and 62 cents, the plaintiff spoke in his evidence that 3 or 4 acres had been damaged, which proved conclusively that he was claiming damages for a larger area. This, however, is not a question that can be allowed to be raised now as it is a question of fact and cannot be decided without further investigations.

Subject to the alterations indicated above in the decrees of the lower Courts with reference to the pond 'Y', the second appeal stands dismissed with costs (Leave to appeal is refused.)

V S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KOMAN.

The Board of Commissioners for Hindu Religious Endowments, Madras, represented by its President .. *Appellant**

v.

Thummalapalli Sivarao and others .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927), section 57—Scope of the powers of the Board in regard to the appointment of managing trustees—Scheme vesting management in one hereditary and two non-hereditary trustees—Modification providing for the appointment of any one of the three as the managing trustee—If ultra vires *the Board*

A scheme framed by the Hindu Religious Endowments Board in 1926 in respect of a non-excepted temple vested the management of it in a board of three trustees, one of them to be a member of a family which possessed a hereditary right to the trusteeship In 1942 the Board modified the scheme The modification provided that the Board should appoint any one of the trustees as the managing trustee for such period as it might deem fit, and it was empowered to entrust him with such powers as it might deem fit and to remove him from such office for good cause. On a question whether the modification was *ultra vires* the Board in that the Board had no power to appoint a non-hereditary trustee as managing trustee,

Held, that the Board had the power to appoint any trustee whether hereditary or non-hereditary to be the managing trustee for a period and hence the modification was quite within its powers

Appeal against the decree and the judgment of the District Court of Kistna, Chilakalapudi, dated 29th June, 1944, and passed in O. S. No. 6 of 1943.

K. Subba Rao and *M Seshachalapathi* for Appellant.

V. Rangachari for Respondents.

The Judgment of the Court was delivered by

The Chief Justice —This is an appeal from a decree of the District Judge of Kistna amending a scheme framed by the Hindu Religious Endowments Board under section 57 of the Madras Hindu Religious Endowments Act The scheme was framed in respect of the Sri Bhimeswaraswami temple at Gudivada It is now admitted to be a non-excepted temple and that the family of Thummalapalli Venkatakrishnayya possessed a hereditary right to the trusteeship. On the 18th June, 1926, the Board framed a scheme under which it vested the management of the temple in a board of three trustees, one of them to be a member of this family. On the 5th November, 1942, the Board modified the scheme. Clause 5 of the modified scheme provided that the Board should appoint one of the trustees as the managing trustee for such period as it might deem fit with power to remove him from the office of managing trustee for good and sufficient cause and that the Board might entrust him with such powers as it might deem fit from time to time in the interest of the administration The hereditary trustee objected to this provision and filed a suit in the District Court for its cancellation.

The learned District Judge held that clause 5 of the modified scheme was *ultra vires* the Board He considered that the Board had no power to appoint one of the other two trustees as the managing trustee In accordance with his finding he amended the scheme by providing that there should be three trustees :

* Appeal No 380 of 1944. 6th November, 1945.

"One of them being the hereditary and managing trustee from Thummalapalli Venkatakrishnayya's family in which it is vested"

He directed that the hereditary trustee should always be the managing trustee subject to certain safeguards The Board have appealed on the ground that the Judge erred in holding that it had exceeded its power in inserting clause 5 in the modified scheme. The contention is well founded In *Krishnamacharlu* v *Rangacharlu*[1], this Court held that under section 63 of the Madras Hindu Religious Endowments Act the Board had power to appoint any trustee, whether hereditary or non-hereditary, to be the managing trustee for a period Section 63 expressly empowers the Board to define the powers and duties of the trustee or trustees, and it was by virtue of this provision that the Court held that the Board had power to appoint any one of the trustees to be the managing trustee for a period Section 63 refers to excepted temples Section 57 under which this scheme was framed only refers to non-excepted temples, but the section confers on the Board the same powers in this respect as are conferred on the Board by section 63 Therefore the decision in *Krishnamacharlu* v *Rangacharlu*[1] has direct application here It follows that the District Judge erred in holding that the Board had no power to appoint a non-hereditary trustee as the managing trustee.

There is no reason, provided that the hereditary trustee is a fit and proper person, why he should not be appointed to the office ; and in a case like the present one preference should be given to him. In these circumstances learned counsel have intimated to the Court that they will probably be able to agree to amendments in the scheme framed by the District Judge so as to satisfy all the parties. We allow the case to stand adjourned until the 5th November, 1945, with a view to a settlement

This appeal coming on for orders by adjournment this day, the 6th day of November, 1945, the Court delivered the following

JUDGMENT —The parties have agreed upon the terms of the scheme. The scheme agreed upon will be substituted for the scheme settled by the District Judge, whose decree will be amended accordingly.

The costs of the parties will come out of the estate.

V S ——— *Decree amended.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE BYERS

V. R R Sami Ayyar . *Appellant* *

Madras House Rent Control Order (1941), *section* 7 (A)—*Scope—Suit for eviction—Civil Courts, if debarred from entertaining and adjudicating upon.*

Section 7 (A) of the Madras House Rent Control Order does not deprive the Civil Courts of their power to entertain suits for eviction and to adjudicate upon them The section merely controls the execution of such a decree by prescribing a special procedure where eviction is sought

Mahmood v *Kerala Corporation, Ltd*, (1945) 1 M L J 44, dissented from

Appeal against the decree of the District Court of Tinnevelly in A S No 355 of 1944, preferred against the decree of the Court of the District Munsiff of Tinnevelly, in O. S No 148 of 1944.

K. Venkateswaran for Appellant.

The Court delivered the following

JUDGMENT —The main ground urged in seeking the admission of this Second Appeal is that the decree for eviction is contrary to section 7 (A) of the Madras House Rent Control Order, 1941. The learned District Judge held that this provision did not oust the jurisdiction of the Civil Court to grant a decree for eviction, but merely controlled the execution of such a decree by prescribing a special procedure where eviction is sought. A reference to sub-clause (*ii*) of clause (*bb*) of

1 (1942) 2 M L J 687 : I.L R (1943) Mad 409

* S. A. No. 2030 of 1945. 3rd December, 1945.

sub-rule (2) of rule 81 of the Defence of India Rules indicates that this view of the scope of section 7 (A) of the House Rent Control Order is correct, and that the jurisdiction of the Civil Courts to grant a decree is not ousted

Reliance is placed on the decision of Chandrasekhara Aiyar, J, in *Mahmood* v *Kerala Corporation, Ltd*,[1] but with due respect I consider that the wording of the section is not such as to deprive the Civil Courts of their power to entertain suits for eviction and to adjudicate upon them What the Control Order prohibits is eviction outside the provision of section 7 (A) of the Order, and to hold that the entire jurisdiction of the civil Courts in these matters apart from eviction is excluded would be ignoring the limitations placed by rule 81 (2) (*bb*) (*ii*) on the exercise of the delegated powers However, it is unnecessary to consider this aspect of the matter any further because the point was clearly abandoned in the trial Court, although the learned District Judge wrongly allowed it to be revived before him in appeal; but this apart it is clear that the appellant is still protected by the Control Order

It is further contended that the learned District Judge has not properly framed the points for decision; in specific terms he may not have done so, but his discussion shows that they were present in his mind, and the error is not a substantial one within the meaning of section 100 (1) (*c*) of the Code of Civil Procedure The final point taken is that the learned Judge has not dealt with the question of notice to quit As the invalidity of the notice depended on the tenancy being an annual one, which the defendants were unable to prove, the point was probably taken no further than the grounds of appeal

The appeal is ordered to be dismissed under Order 41, rule 11 of the Code of Civil Procedure.

K S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE BYERS

Vennety Satyanarayana . *Appellant**

v

Pydimarri Satyanarayana, Managing Director of Andra Pracharini Ltd, Rajahmundry *Respondent*

Madras House Rent Control Order (1941), *section* 7 (A) (*as amended in* 1944)—*Scope—Suit for eviction—Civil Court's jurisdiction to pass decree for—Is not taken away—Suit filed before amendment—Law applicable*

The law applicable to a suit for eviction is the Madras House Rent Control Order as it stood in its unamended form at the time of the institution of the suit in April, 1944

Moothaliandam Chetty v *Venkatesam Chetty*, (1945) 1 M L J 441, referred to

The right of the plaintiff to get a decree for eviction was not affected in any way by the amendment of section 7 (A) in July, 1944 The section does not prevent a plaintiff from obtaining a decree in the hope that he may later be able to execute it

Mahmood v *The Kerala Corporation, Ltd*, (1945) 1 M L J 44, dissented from

Appeal against the decree of the District Court of East Godavari at Rajahmundry in Appeal Suit No 213 of 1944, preferred against the decree of the Court of the District Munsiff of Rajahmundry in Original Suit No 103 of 1944.

P V Vallabhacharyulu for Appellant

Srimathi G Durga Bai for Respondent.

The Court delivered the following

JUDGMENT —It follows from what has been said by Mockett, J., in *Moothaliandam Chetty* v *Venkatesam Chetty*[2] that the law applicable to the plaintiff's suit for eviction was the House Rent Control Order as it stood in its unamended form at the time of the institution of the suit in April, 1944. The amendment of section 7-A

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* S A. No. 1211 of 1945.

1. (1945) 1 M L J 44.
2. (1945) 1 M.L.J. 441.

15th January, 1946.

in July, is said to have taken away from the plaintiff the right to get a decree in eviction; but with all due respect to the learned Judge who decided the case in *Mahmood v The Kerala Corporation, Ltd*,[1] I think the learned District Judge was wrong in his view that the right of the plaintiff to get a decree for eviction was in any way affected. The Madras House Rent Control Order, 1941, was passed in exercise of the powers conferred by clause (*bb*) of sub-rule (2) to rule 81 of the Defence of India Rules which have been delegated by the Central Government to the Provincial Government, and the rule contemplates an order to provide *inter alia* for "preventing the eviction of tenants and sub-tenants from such accommodation in specified circumstances" It cannot be said that these words are wide enough to deprive the Civil Courts of their jurisdiction to pass decrees; all that the rule contemplates is the control of the relief of eviction Mr Raghava Rao contended that what the plaintiff should have done after validly instituting the suit and finding that the position had been changed by the amendment of July, 1944, was to withdraw his suit and then apply to the Collector for an order of eviction; but although the plaintiff might have done this, there was in my view nothing to prevent him from proceeding to a decree if he chose to do so in the hope that he would be able to execute it when the ban imposed by the control order had been lifted. It may be that the plaintiff could see that under the amended order he would have little or no chance of succeeding in evicting his quondam tenant, but the section does not prevent him from obtaining the decree in the hope that he may be able to execute it later on As Mr Raghava Rao points out the question is now of little more than acamedic interest because as things stand a decree cannot be executed.

In the result the appeal is accepted, the decision of the lower appellate Court is set aside, and the decree for eviction passed by the trial Court is restored with costs throughout.

(Leave is refused.)

K S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE SHAHABUDDIN.

A. V. N. Abu Bakkar Marakayar .. *Appellant**

v.

S Ramaswami Ayyar *Respondent*

Madras Agriculturists' Relief Act (IV of 1938 *as amended by Act XV of* 1943), *sections* 19-A *and* 25-A —*Order declaring amount due as scaled down—Suit by mortgagee to enforce mortgage after the amending Act—Suit whether maintainable in view of provisions of section* 19-A *of amending Act—Subsequent alienee's non-joinder whether fatal to suit*

The appellant applied, in 1940, under the rules framed under the Madras Agriculturists' Relief Act for a declaration of the amount due by him under a mortgage claiming to be an agriculturist entitled to the benefits of the Act The debt was scaled down and the amount payable by the appellant was determined Subsequently Madras Act XV of 1943 was passed amending the Madras Agriculturists' Relief Act by inserting sections 19-A and 25-A. On the question whether a suit to enforce a mortgage after the amending Act came into force was maintainable, in view of sub-section (9) of section 19-A,

Held, that there was nothing in the new provisions preventing the respondent from suing to enforce his mortgage

The right of suing to enforce a mortgage which the respondent undoubtedly had when the amending Act was passed could not have been extinguished without express words

The non-joinder of a subsequent alienee will not be fatal to the suit, the only result being that the decree will not bind him

Appeal against the decree of the Court of the Subordinate Judge of Tanjore, dated 23rd June, 1944, and passed in O.S. No. 10 of 1944.

1. (1945) 1 M.L J. 44

*Appeal No 543 of 1944. 20th November, 1945.

S. K Ahmed Meeran and *K K Pocker* for Appellant.

K V Ramachandra Aiyar for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, J—This appeal has been brought by the defendant from a decree passed on foot of a mortgage executed by him in favour of the respondent on 22nd June, 1930

In 1940 the appellant applied under the rules framed under the Madras Agriculturists' Relief Act for a declaration of the amount due by him under the mortgage claiming to be an agriculturist entitled to the benefits of the Act The debt was accordingly scaled down and the amount payable by the appellant was determined Subsequently Madras Act XV of 1943 was passed amending the Agriculturists' Relief Act by inserting therein sections 19-A and 25-A By section 19-A the procedure provided by the rules for scaling down debts due by agriculturists on application by the debtor or the creditor as the case may be was superseded and similar provisions were introduced with some additions and alterations among which were a provision requiring all persons who would be necessary parties to a suit for the recovery of the debt to be impleaded as parties to applications made under the section and a further provision enabling the creditor, after the passing of an order declaring the amount due as scaled down, to obtain a decree for such sum on payment of the appropriate court-fee while barring his right to sue for its recovery.

The main point argued before us relates to the plea that the suit brought to enforce the mortgage after the amending Act came into force was not maintainable, in view of sub-section (9) of section 19-A which provides that ·

"no Court shall entertain a suit by the creditor for the recovery of a debt (*ii*) if a Court having jurisdiction has passed an order under clause (*a*) of sub-section (4) in respect of such debt"

It is not disputed this countervailing disability must have the same scope as the right newly conferred on the creditor under sub-section (5) of obtaining a decree, on payment of the necessary court-fee, after the determination of the amount due in respect of the debt as scaled down It is, however, urged that even though the proceeding for the determination of the sum due in respect of the mortgage-debt instituted under the rules had terminated long before the amending Act came into force, it is open to the creditor to avail himself of the new provisions of sub-section (5) of section 19-A and he is accordingly precluded under sub-section 9 (*ii*) from maintaining the suit We are unable to agree with this contention These provisions make it clear that it is only when orders have been passed under clause (*a*) of sub-section (4) that the right as well as the disability arises They do not provide that the creditor shall be entitled to apply for a decree or shall be precluded from instituting a suit if the Court has passed an order either under clause (*a*) of sub-section (4) of section 19-A or under the old rules in respect of the debt The right of suing to enforce the mortgage in question which the respondent undoubtedly had when the amending Act was passed could not have been extinguished without express words It is significant that section 5 of the amending Act makes only the provisions of section 3, which inserts the new section 25-A in the principal Act, retrospective and not the provisions of section 2 which introduces section 19-A. We are therefore of opinion that there is nothing in the new provisions to prevent the respondent from suing to enforce his mortgage.

It is next urged that the sum of Rs 535-7-2 paid into Court as the compensation payable in respect of the compulsory acquisition of one of the hypothecated items having been paid out to the respondent who had attached it in execution of a money decree obtained by him against the appellant, the amount should be applied only in *pro tanto* discharge of the mortgage debt The respondent who was examined in the suit deposed that he was not aware that the amount in deposit represented the compensation payable in respect of an item included in his mortgage, and that he had it attached as an asset of the judgment-debtor and applied in satisfaction of his money decree. It is not disputed that the appellant has thus had the benefit

of his decree-debt being discharged by the application of that sum As the question here arises only between the debtor and the creditor, no rights of third parties in or to the amount being involved, there is no substance in the appellant's complaint that the fund in Court was applied in discharge of the money decree obtained by the respondent and not in *pro tanto* reduction of the mortgage-debt Reference was made in this connection to section 73 (2) of the Transfer of Property Act but that provision has no application here as it only preserves to the mortgagee his right of security in the compensation money

Thirdly, it was contended that one of the items hypothecated to the respondent, namely, item 6, had been alienated subsequently to the mortgage to a third party and the purchaser not having been impleaded, the suit must fail for non-joinder. This plea is clearly unsustainable as the only effect of not impleading the subsequent alienee will be that the resulting decree will not bind him Such non-joinder is not fatal to the suit.

Lastly, the appellant complained that the lower Court unjustly refused to grant an adjournment which was applied for and the appellant had consequently no adequate opportunity to defend the suit properly It was said that the written statement was filed on the 23rd June, 1944, and the Court proceeded to frame the issues, try the suit and pass the decree on the very same date It is however seen from the B diary that the suit was adjourned on the 14th April, 1944, and posted to the 23rd June for written statement and trial It must be borne in mind in this connection that there had been previous proceedings between the parties already for determination of the amount due under the suit mortgage after scaling down the same under Act IV of 1938 There was not much room, therefore for further disputes in the suit and the appellant's learned counsel has not been able to show that his client was prejudiced by the manner of disposal in the Court below

There are no merits in the appeal which is accordingly dismissed with costs

K C. *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE SOMAYYA.

The Municipal Council of Vizagapatam represented by its Commissioner *Appellant** (*Defendant*)

v

Vyricherla Chendramani Pattamahadevi, Zamindarini of Chemudu . *Respondent* (*2nd Plaintiff*).

Madras District Municipalities Act (*V of* 1920), *section* 81 (1), (3) *and* (4)—"*Land used exclusively for agricultural purposes*"—*Meaning—Land neither let out to tenant nor cultivated—Actual user for agriculture—If necessary*

In order that certain land might come within the expression "lands used exclusively for agricultural purposes" under section 81 (4) of the Madras District Municipalities Act, the land must have been used exclusively for agricultural purposes and it is not sufficient if it is merely capable of being used exclusively for agricultural purposes Where the land in question which was situate within municipal limits and was owned by the landholder was previously in the possession of a tenant, and the landholder having obtained a decree got possession thereof in September, 1939, but the land itself was neither let out nor cultivated, the municipality sought to tax the said land under section 81 (3) of the Act during the revision in 1940,

Held, that the land could not be said to be used for agricultural purposes at the time of the revision of assessment and that the Municipality was entitled to levy property tax in respect thereof

Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam, dated 18th July, 1944, and passed in Appeal Suit No 88 of 1944, preferred against the decree of the Court of the District Munsiff of Vizagapatam, dated 27th November, 1943, and passed in Original Suit No 10 of 1942.

P. S. Raghavarama Sastri for Appellant

K. Umamaheswaram for Respondent.

* S. A. No. 2506 of 1944. 13th November, 1945.

The Court delivered the following

JUDGMENT.—The question in this case is whether the suit property falls under section 81, clause 3 of the Madras District Municipalities Act (V of 1920) Section 81, clause 1, says that if the council by a resolution determines that a property tax shall be levied, such tax shall be levied on all buildings and lands within municipal limits save those exempted by or under the Act or any other law The tax may be for general purposes, for water and drainage, etc Section 81, clause 2 says that the tax shall be levied at such percentage of the annual value as may be fixed by the Municipal Council, subject to the provisions of section 78 Then comes clause 3, which runs as follows

"The Municipal Council may, in the case of lands which are not used exclusively for agricultural purposes and are not occupied by, or adjacent and appurtenant to, buildings, levy these taxes at such percentages of the capital value of such lands or at such rates with reference to the extent of such lands, as it may fix"

Clause 4 says that the municipal council may, in the case of lands used exclusively for agricultural purposes, levy the tax at such proportion as it may fix of the annual value of such lands as calculated in accordance with the provisions of section 79 of the Madras Local Boards Act, 1920 The land in question is situated within the municipal limits of Vizagapatam, and is owned by the respondent, Chandramani Pattamahadevi, the Zamindarini of Chemudu It appears to have been in the possession of a tenant and a suit was filed by the respondent in the year 1936 for recovery of possession A decree was passed and in execution of that decree, the respondent obtained possession on 11th September, 1939 There was a general revision of the property tax in 1940 and the appellant sought to tax the suit land as one coming under clause 3 of section 81 The respondent resisted this action and sought to bring the land under section 81, clause 4 of the Act The question is, does it come within the meaning of the expression "lands which are not used exclusively for agricultural purposes," in which case clause 3 will apply, or, does it come under the category of cases of lands used exclusively for agricultural purposes when it will come under clause 4 It is admitted that in February, 1940, as part of the general revision the land in question was assessed on the basis that it comes under clause 3 By February, 1940, the land had not been cultivated after the respondent obtained possession in execution of the decree against her previous tenant. Notice for the first half year of 1940-41 was issued on 31st March, 1940, and for the second half-year the notice was issued on 27th November, 1940 Objections were filed by the respondent stating that the suit land did not come under the category of lands which are not used exclusively for agricultural purposes. The appellant overruled her contention and proceeded to levy the tax under section 81, clause 3 Hence this suit The trial Court held in favour of the municipal Council and dismissed the suit which was one by the respondent for declaration that the basis of the assessment is erroneous and for recovery of the assessment which had been collected for the two half years On appeal the Subordinate Judge held that though the land was not being actually cultivated at the time of the revision, still the respondent had not given up and abandoned all idea of cultivation and that therefore the land came under section 81, clause 4

The expression used in section 81, clause 4, is not land which is capable of being used exclusively for agricultural purposes. But the language used is this "lands used exclusively for agricultural purposes" Taking clause 4, the land must have been used exclusively for agricultural purposes and not merely that it must be capable of being used exclusively for agricultural purposes It is not enough that the owner merely intends to use the land exclusively for agricultural purposes The meaning will be made clear if we refer to clause 3, where the expression is "lands which are not used exclusively for agricultural purposes" The expression "which are not used exclusively for agricultural purposes" refers obviously to the point of time when the revision is made. No doubt, if before the revision the land was actually used for agricultural purposes, and the revision takes place before the next cultivation season commences, then it may be said that the land was still being used for agricultural purposes, notwithstanding the fact that there were no crops on the

land or. even though the land was not actually ploughed up. But in this case possession was taken by the respondent on 11th September, 1939 The revision was in February 1940. It is clear that there was a cultivation season between September, 1939 and February, 1940 It is not said that this period is between the harvesting of one crop and the beginning of the next cultivation season In fact, the evidence given by the respondent is to the effect that the land was not let and was not used for agricultural purposes, because the estate authorities were afraid of letting the land to any tenant as the tenants would claim occupancy rights That is the reason given by the respondent for the land having been uncultivated at the time of the revision. From the evidence which was recorded in the year 1943, it appears to be clear that the land was not cultivated at any time between 1939 and 1943. The fear is still there and the land is being kept without being let out to tenants Further, letting to the tenants is not the only mode of using it for agricultural pruposes It may be by cultivation by hired labour or by farm servants. I am of opinion that in this case the lands were not being used for agricultural purposes in February 1940 when the assessment was made. The decree of the lower appellate Court is set aside and that of the District Munsiff is restored with costs throughout

(No leave)

B.V V. *Appeal allowed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR JUSTICE LAKSHMANA RAO AND MR JUSTICE KUPPUSWAMI AYYAR.

Karanamurthi Thevar .. *Appellant**

v.

Ramanatha Thevar *Respondent.*

Limitation Act (IX of 1908), *Articles* 62 *and* 120—*Applicability—Claim against a benamidar in respect of moneys received and held by him for the benefit of the real owner—Article* 120 *applies*

It is now settled law that Article 62 of the Limitation Act cannot be applied where the claim is on an equitable basis *Guru Narain Singh* v *Sheolal Singh*, (1918) 46 I A 1 and *Annamalai Chettiar* v *Muthukaruppan Chettiar*, (1930) 58 I A 1, Followed

On the 29th September, 1933, *K* father of plaintiff, conveyed immoveable property to the defendant *benami* On the 25th January, 1937, the defendant sold the property to one *A* for Rs 750 On the 30th December, 1938, *K* died On the 5th October, 1942, the present suit was instituted by the plaintiff to recover from the defendant the Rs 750 which he had received from *A* On the question whether the suit was within time,

Held, that the plaintiff's claim against the defendant was an equitable one, being claim against a benamidar, a person in the position of a trustee, in respect of moneys received and held by him for the benefit of the real owner and as such the case fell within Article 120 of the Limitation Act, and the suit was not time-barred

Mahabala Bhatta v *Kunhanna Bhatta*, (1898) 8 M L J 139 I L R 21 Mad 373, *Subbanna Bhatta* v *Kunhanna Batta*, (1907) 17 M L J 224 I L R 30 Mad 298 and *Narayanan* v *Rangasami Chetti*, 1915 M W N 215, overruled in so far as they related to the application of Article 62 to such a claim against a benamidar

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in A S No 14 of 1944, preferred against the decree of the Court of the District Munsiff, Periyakulam, In O. S No. 272 of 1942

K. S. Desikan for Appellant.

G. R Jagadisa Aiyar and *J. R. Alwar Naidu* for Respondent.

This appeal coming on for hearing, the Court, *Rajamannar, J*, made the following

ORDER OF REFERENCE TO A FULL BENCH (7-9-1945) —In this case the question left undecided in *Devarajulu Naidu* v *Jayalakshmi Ammal*,[1] namely, whether Article 62 of the Limitation Act applies to a claim by the real owner against a benamidar as decided in *Mahabhala Bhatta* v *Kunhanna Bhatta*[2], *Subbanna Bhatta* v *Kunhanna Bhatta*[3], and *Shanmugha Pillai* v *Minor Govindaswami*[4] directly arises Their Lordships say that it is not necessary to consider whether those cases were rightly decided. They also refer to an unreported case *Narayana Bhatta* v *Mahabala Bhatta*[5], where Benson and Bhashyam

* S A No 385 of 1945. 3rd December, 1945.

1 (1941) 2 M L J 222 at 224.

2 (1898) 8 M.L J 139 : I L R. 21 Mad. 373

3. (1907) 17 M.L.J. 224 : I.L.R. 30 Mad. 298

4 (1907) 17 M L.J 452 : I L R 30 Mad 459.

5. S. A. No. 1469 of 1901.

Ayyangar, JJ , hold that a suit against a benamidar was governed by Article 120 and not by Article 62 The Privy Council in *Gur Narain* v *Sheolal Singh*[1] point out that a benamidar is in the position of a trustee though he would not be in the position of an express trustee to attract the application of section 10 of the Limitation Act

On the allegations in the plaint and on the concurrent findings of both the Courts the position in this case is this One Kandaswami Thevar, the father of the plaintiff, executed a conveyance of the property in suit in favour of the defendant nominally, but the title continued in him and the defendant was only a benamidar. The defendant sold the property to one Arunachalam Pillai in 1937 for a sum of Rs 750 and received the consideration himself The plaintiff's father died in 1938 and the plaintiff brings the present suit as the heir of his father for the recovery of this amount. In effect, this is a claim by the real owner against a benamidar for the recovery of amounts received by the benamidar for and on behalf of the real owner. The case would appear to fall directly within the scope of the rulings above referred to, namely, *Mahabala Bhatta* v *Kunhanna Bhatta*[2], *Subbanna Bhatta* v *Kunhanna Bhatta*[3] and *Shanmugha Pillai* v *Minor Govindaswami*[4] Apart from the conflict between these decisions and the unreported decision referred to, *Narayana Bhatta* v *Mahabala Bhatta*[5] the position may have to be considered whether they were rightly decided in view of the decision of the Judicial Committee in *Annamalai Chettiar* v *Muthukaruppan Chettiar*[6], In the circumstances, I think it is desirable that the papers should be placed before my Lord the Chief Justice for orders

In pursuance of the aforesaid Order of Reference, the judgment of the Court was delivered by

The Chief Justice —This Full Bench has been constituted to consider whether the Court rightly applied Article 62 of the Limitation Act in *Mahabala Bhatta* v *Kunhanna Bhatta*[2], *Subbanna Bhatta* v *Kunhanna Bhatta*[3] and *Narayanan* v *Rangaswami Chetti*[7]. These cases are in conflict with the decision of a Division Bench of the Court in an unreported case to which reference will be made later and it is said that two decisions of the Privy Council show clearly that they were wrongly decided in this respect

We will first state the facts of the present case as the whole appeal is before us. On the 29th September, 1933, Kandaswami Thevar, father of the plaintiff, conveyed immoveable property to the defendant *benami*. On the 25th January, 1937, the defendant sold the property to one Arunachalam Pillai for Rs 750 On the 30th December, 1938, Kandaswami Thevar died On the 5th October, 1942, the present suit was instituted to recover from the defendant the Rs 750 which he had received from Arunachalam Pillai. The District Munsiff of Periyakulam in whose Court the suit was instituted, held that the defendant was a benamidar for the plaintiff's father and that the suit was not time-barred as Article 120 of the Limitation Act applied, but he considered that the plaintiff was only entitled to recover Rs 375 as the other half of Rs. 750 belonged to his mother. The defendant appealed to the Subordinate Judge of Dindigul, who agreed with the District Munsiff The defendant then appealed to this Court on the ground that the suit is governed by Article 62 of the Limitation Act and therefore was filed out of time

In *Mahabala Bhatta* v *Kunhanna Bhatta*[2], *A* and *B* jointly advanced moneys on the security of a usufructuary mortgage in the name of *B*, their benamidar Later in 1884 *A* advanced moneys on the security of other usufructuary mortgages Here again *B* acted as his benamidar. *A* died leaving three sons, two of whom were the plaintiffs They had separated from their brother and in 1894 they sued *B* and the mortgagors for a declaration of their rights in the mortgages No rent had been collected by *B* for several years before the suit. The Division Bench which heard the appeal held that the plaintiffs were entitled to a declaration of their right to the mortgages, but dismissed their claim for rent as being barred by limitation Although there is no reference in the judgment to Article 62, the Court apparently applied it.

In *Subbanna Bhatta* v *Kunhanna Bhatta*[3] another Division Bench held that the period of limitation for an action by the real owner against a benamidar to recover

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1 (1918) 36 M L J 68 L.R 46 I A 1
I L R. 46 Cal 566 (P C)
2 (1898) 8 M L J 139 I L R 21 Mad 373
3. (1907) 17 M L J 224 I L R 30 Mad. 298
4. (1907) 17 M.L J. 452 I L R 30 Mad 459
5 S A No 1469 of 1901
6. (1930) 60 M L J 1 L R. 58 I A 1 . I.L. R 8 Rang 645 (P C).
7 1915 M W N 215.

money received by the latter for the use of the former was that prescribed in Article 62 The Court followed the decision in *Mahabala Bhatta* v *Kunhanna Bhatta*[1]. The decision in *Narayanan* v *Rangaswami Chetti*[2], was to the same effect; but here the later case of *Subbanna Bhatta* v *Kunhanna Bhatta*[3] was relied on

The unreported case is *Narayana Bhatta* v. *Mahabala Bhatta*[4] in which Benson and Bhashyam Ayyangar, JJ., held that in such a case the appropriate article was Article 120. There the first defendant held a mortgage and a reversion in a lease as the benamidar of the plaintiff's father It was pointed out that by reason of section 95 of the Indian Trusts Act he was bound to perform the same duties and was subject to the same liabilities as if he were a trustee of the property for the plaintiff's father. Therefore Article 62 did not apply and the case fell within the residuary Article 120.

In *Annamalai Chettiar* v. *A M K C T. Muthukaruppan Chettiar*[5], the Privy Council held that the benamidar is not an express trustee, but he occupies a fiduciary position. In *Gur Narayan* v *Sheolal Singh*[6] the Judicial Committee said that the benamidar represents the real owner and that so far as their relative legal positions are concerned, the benamidar is a trustee for the real owner *Annamalai Chettiar* v *A M K C T Muthukaruppan Chettiar*[5], related to a suit for an account of moneys in the hands of benamidars The question was whether it had been brought in time Their Lordships expressly held that Article 62 did not apply to an equitable claim against a trustee liable to account for an account and ascertainment of what might be due In such a case the period of limitation was governed by Article 120 Therefore it is now settled law that Article 62 cannot be applied where the claim is on an equitable basis

The two decisions of the Judicial Committee just referred to were applied by this Court in the recent case of *Devarajulu Naidu* v *Jayalakshmi Ammal*[7] There two brothers *A* and *B* sold immoveable property to *K* for Rs 3,000 and in part discharge of the purchase consideration *K* executed a promissory note for Rs. 1,560 in favour of *C*, the wife of *A*. *C* quarrelled with her husband and left him. She then fraudulently indorsed the promissory note to *D* without consideration, her object being to defeat her husband and his brother. *D* sued the maker of the note and obtained a decree for Rs 1,653-8-0. The suit which gave rise to the appeal was filed by *A* and *B* to recover this amount from *D* If Article 62 applied, the suit was out of time but within time if Article 120 applied It was held that in indorsing the promissory note to *D*, *C* wrongly converted it and that *D* took it with full knowledge of the facts In these circumstances he acquired no title to it. *A* and *B* had obviously an equitable claim against *D* and it was held that by reason of the pronouncements of the Privy Council in *Annamalai Chettiar* v *A M K C T. Muthukaruppan Chettiar*[5] and *Gur Narain* v. *Sheolal Singh*[6] Article 62 could not be applied and that the period of limitation was six years under Article 120.

The plaintiff's claim against the defendant is certainly an equitable one, being claim against a benamidar, a person in the position of a trustee, in respect of moneys received and held by him for the benefit of the real owner This being the position the Courts below rightly held that the case fell within Article 120 of the Limitation Act. The appeal must be dismissed with costs

It follows that the decision of this Court in *Mahabala Bhatta* v. *Kunhanna Bhatta*[1] *Subbanna Bhatta* v. *Kunhanna Bhatta*[3], and *Narayanan* v. *Rangaswami Chetti*[2], in so far as they relate to the application of Article 62 to a claim against a benamidar in respect of money held by him on behalf of the true owner, are overruled.

V.S. —— *Appeal dismissed.*

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1. (1898) 8 M L J 139 I L R. 21 Mad 373
2. 1915 M W N 215
3. (1907) 17 M L J. 224 I L R 30 Mad. 298.
4. S. A. No. 1469 of 1901.
5. (1930) 60 M L J 1 L R 58 I A 1 I L R. 8 Rang 645 (P C)
6. (1918) 36 M L J 68, L R 46 I.A 1, I L R. 46 Cal 566 (P C)
7. (1941) 2 M L J 222.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AIYAR.

K. Jagadeesa Ayyar . *Appellant**

v.

Bavanambal Ammal . .. *Respondent.*

*Transfer of Property Act (IV of 1882), section 70—Money-decree-holder—Purchase in execution of two houses—Charge decree on the same items by a decree on a compromise—How far the charge can affect the later sale—Registration, if necessary for the compromise decree—*Res Judicata *whether applicable to the case—Section 70 of the Transfer of Property Act whether applicable*

A money decree-holder, who purchased two houses in execution of his simple money decree objected to their being sold under a charge decree for maintenance obtained as a result of a compromise in another suit of 1927 between the parties His objections were that the decree creating a charge was bad for want of due registration, that a certain prior order obtained by the judgment-debtor to stop the sales of those houses along with other items operated as *res judicata* against the present contentions of the charge decree-holder, and that section 70 of the Transfer of Property Act did not apply to the present case because of the impossibility of a contract to the contrary existing in the case of a charge created by a decree of Court

Held, (1) That since the compromise was embodied in a decree no registration or attestation was necessary.

(2) That in the absence of any decision covering the question now raised and dealing with the particular items which are in dispute, and having regard to the *prima facie* view taken by the Court in the earlier dispute, that order could not be read as involving any final decision and attracting the bar of *res judicata* against the charge decree-holder's present contentions (3) As the decree was based on a compromise the rights can be altered or modified by fresh contracts and it was open to the defendant in the maintenance suit to have contracted with the decree-holder out of the rule about accession.

Appeal against the order of the Court of the Subordinate Judge, Cuddalore, dated 16th March, 1944, in E. P. No. 14 of 1943 in O. S. No. 39 of 1927

S. Panchapagesa Sastri and *P S. Ramachandran* for Appellant.

T. E. Ramabhadracharıar for Respondent.

The Court delivered the following

JUDGMENT.—The fourth defendant, who is the appellant in this appeal, is a simple money decree-holder who has purchased door Nos. 17 and 18 in execution of his decree He objects to their being sold under the charge decree for maintenance made in O S. No 39 of 1927 His contentions are four-fold and can be stated briefly as follows The decree creating a charge is bad for want of registration if the charge is to be deemed as one brought into existence by the act of parties. The second point is that a prior order made on 23rd October, 1933, on an application by the judgment-debtor to stop the sale of houses bearing Nos. 18, 19, 20, 21 and 26 is *res judicata* against the contention raised by the charge decree-holder. The third point taken is that section 70 of the Transfer of Property Act which says that accession to the mortgaged property shall, in the absence of a contract to the contrary, enure to the benefit of the mortgagee does not apply to the present case because there could be no contract to the contrary in the case of a charge created by a decree of Court Lastly, under the decree, what was charged were only the two houses then existing but not the site comprised within the boundaries specified in item 1 of the decree and consequently present door Nos 18 and 19, which admittedly came into existence after the decree and were built upon the site not charged cannot be treated as accessions to the mortgaged property..

There is no substance either in the first or the last point. The charge created as the result of a compromise entered into between the parties in the maintenance suit has become embodied in the decree No registration or attestation is therefore necessary.

A reading of the Tamil description of the schedule of property as given in the counter statement filed by the respondent satisfies me that it was not merely the two superstructures that were charged but also the site comprised within the boun-

* A. A. O. No. 587 of 1944. 10th October, 1945.

daries specified Reference was made to the difference in the description of item 2 where the property sought to be charged is separately mentioned as "the ground and the thatched house" The reason for the distinction is apparent The second item was a thatched house and it might well have been contended if that alone had been mentioned without the site that the thatched house alone was intended as security. Such considerations do not apply to what may be called pucca buildings erected on sites belonging to the mortgagor, especially when there was no reason for thinking that any reservation of the site was intended or contemplated.

Coming to the second point, the prior order is found at page 9 of the printed papers and is marked as Ex D-4. It is indeed true, as found by the Subordinate Judge, that, though the question was raised that Nos 18 and 19 along with Nos 20 21 and 26 did not form part of the charge, there was no decision by the Subordinate Judge then to this effect as regards the numbers with which we are now concerned. He held in a general kind of way that, as the decree specified only two houses and as what was brought to sale were six houses, there was an attempt to sell what was *prima facie* in excess of the decree and that therefore the sale of the first item should be stopped. The question whether these items 18 and 19, could be said to have become affected by the charge decree and covered by it, which is the point now raised, was not then before the Court. It might well have been that the sale was stopped because items 20, 21, and 26 were held to be not comprised in the charge, just as it might have been that items 18 and 19 might not have been regarded as charged also. But in the absence of any decision covering the question that is now raised and dealing with the particular items which are not in dispute and having regard to what could only be regarded as a very *prima facie* view that was then taken by the Court as to what fell within the decree and what not, as superficial appearances went, I am not prepared to read this order as involving any final decision and attracting the bar of *res judicata* against the contention now raised by the charge decree-holder.

The objection to the applicability of section 70 is that, as the charge was created by decree, there could be no contract to the contrary in such a case, and that it is only when the parties could so contract that the rule would apply It was stated already that the decree in this case was based on a compromise entered into between the parties under which a charge was created Notwithstanding the decree, it was still a contract of the parties, the decree merely imposing the seal of the Court on this contract Nothing prevents the parties from contracting out of the rights created under the decree even after its date. All that could be said is that such a contract cannot affect the decree directly. The position is not analogous to a statutory charge, which is dealt with and discussed in *Corporation of Calcutta* v *Arunchandra Singha*[1] Where there is a statutory charge or lien which springs into existence as soon as a certain thing is done, there is no right in the parties to alter or obliterate the charge. But in the case of a decree based upon a compromise, the rights can be altered or modified by fresh contracts though they would not be able to go before the Court on the basis of such fresh contracts and ask the decree to be correspondingly modified When the defendant in the maintenance suit made up his mind to build new structures on the charged property, it was open to him to have contracted with the decree-holder out of this rule about accession.

It is unnecessary in this case to go into the other question whether section 100 of the Transfer of Property Act, which makes the provision applicable to simple mortgages applicable as far as may be to charges created by act of parties or operation of law, which govern charges created by decrees of Court. There is a conflict of view on this question and my impression is that, so far as Madras is concerned, it has been held that decrees of Court will come within the ambit of section 100; but I do not want this expression of opinion to be regarded as final.

The appeal will stand dismissed with costs.

K.C. —— *Appeal dismissed.*

1. (1933) I.L.R. 60 Cal. 1470.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE BYERS.

P. A. Raju Chettiar and others . *Appellants**.

Hoarding and Profiteering Prevention Ordinance (XXXV of 1943), *sections* 2 (*b*) 6 (1) and 13 (1)—'*Dealer*'—*Includes all members of a partnership—Absentee partners—Non-residence in the place of business—Liability cannot be avoided—General Clauses Act (X of* 1897), *sections* 3 (39) and 30—*Applicability to Ordinances—Government of India Act* (1935), *section* 317 *and the Ninth Schedule—Effect—Section* 205—*Substantial question of law*

As section 317 of the Government of India Act, 1935 read with the Ninth Schedule makes it clear that section 72 of the Government of India Act, 1915, continues to have effect notwithstanding the repeal of that Act by the Tenth Schedule of the Act of 1935, an Ordinance framed under section 72 of the Act of 1915 read with section 317 of the 1935 Act, is a "Central Act" for the purposes of the definition of that term in section 30 of the General Clauses Act Consequently all the members of a partnership would be 'dealers' within the definition of that word in section 2 (*b*) of the Hoarding and Profiteering Prevention Ordinance read with section 3 (39) of the General Clauses Act

The absentee partners cannot escape liability for an offence under section 6 (1) read with section 13 (1) of the Ordinance merely by proof of non-residence in the place where the business was transacted.

Where the question raised turns upon a plain reading of the unambiguous words of the sections of the Government of India Act involved, there is no substantial question of law involved within the meaning of section 205 of the Government of India Act.

Appeals against the judgments of the Chief Presidency Magistrate, Egmore of the Court of the Presidency Magistrates, Madras in Calendar Cases Nos. 320 and 321 of 1945 dated 28th March, 1945.

K. S Jayarama Aiyar, S S Rajagopalan and *T. K Rajagopalan* for Appellants in both the appeals.

The Crown Prosecutor (*P Govinda Menon*) on behalf of the Crown.

The Court delivered the following

JUDGMENT :—The four appellants are partners in a business in Madras, three of them being absentee partners living in Coimbatore and the fourth being in actual charge of the business. They have been convicted of four offences punishable under section 6 (1) read with section 13 (1) of the Hoarding and Profiteering Prevention Ordinance in respect of sales of soda ash at prices which showed a profit of between 210 per cent and 216 per cent instead of the statutory 20 per cent. above the landed cost. The absentee partners have been sentenced to pay fines totalling Rs. 300 each and the managing partner at Madras has been sentenced to pay fines of Rs. 2,000 on each of the four counts. The fines have all been paid

On the facts Mr. K. S. Jayarama Aiyar raises no contest and he confines himself to two arguments ; the first is that the definition of a dealer or producer contained in the Ordinance does not include the absentee partners at Coimbatore, and the second is that the fines are in any event excessive.

According to section 2 (*b*) of the Ordinance a dealer is defined to be

"a person carrying on the business of selling any article, whether wholesale or retail"

and Mr Jayarama Aiyar's contention is that the absentee partners cannot be brought within the scope of this definition because the General Clauses Act does not apply to an ordinance framed by the Governor-General. Under section 3 (39) of the General Clauses Act a 'person' is defined in this way :

"A person shall include any company or association or body of individuals, whether incorporated or not."

and Mr. Jayarama Aiyar argues that although the General Clauses Act applies to the Defence of India Act and the rules framed thereunder so as to impose liability on absentee partners and proprietors, the absentee partners at Coimbatore cannot be made liable in these cases because the Hoarding and Profiteering Prevention Ordinance is not a Central Act This argument is readily disposed of by a reference to section 30 of the General Clauses Act where a Central Act is by a later amendment, thus defined :

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* Crl. Appeals Nos. 378 and 379 of 1945. 17th October, 1945.

"In this Act the expression 'Central Act' wherever it occurs . . . . . shall be deemed to include an ordinance made and promulgated by the Governor-General under . . . section 72 of the Government of India Act, 1915 . . . "

The preamble to the Hoarding and Profiteering Prevention Ordinance is in these words:

"Now, therefore, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, (26 Geo, 5, C 2), the Governor General is pleased to make and promulgate the following Ordinance"

Section 317 of the Government of India Act read with the Ninth Schedule makes it clear that section 72 of the Government of India Act, 1915, continues to have effect notwithstanding the repeal of that Act by the tenth Schedule of the Act of 1935. Thus there is no difficulty in finding that an Ordinance framed under section 72 of the Act of 1915, read with section 317 of the Act of 1935 is a Central Act for the purposes of the General Clauses Act. Consequently all members of the partnership to which the appellants belong are dealers

Apart from this aspect of the matter Mr. Jayarama Aiyar contends that a dealer or producer within the meaning of the Ordinance can mean only the person actually effecting the sale, and in support of this argument he refers to an amendment made in December 1944 to section 6 of the Ordinance. It is in these words:

"To the said section 6 the following sub-section shall be added namely 'where any article is sold, offered for a sale or otherwise disposed of in contravention of sub section (1) by a dealer or producer through any person employed by him or acting on his behalf, such person and also, unless they prove that they exercised due diligence to prevent such contravention, a dealer or producer as the case may be, and any person having charge on behalf of the dealer or producer of the place where the contravention occurred shall be liable to punishment provided by sub-section (1) of section 13, whether or not they were present when the contravention occurred'"

Mr. Jayarama Aiyar contends that this section imposed upon absentee dealers or producers for the first time the liability which ordinarily attached only to salesmen or other employees in a shop, but it seems clear from the wording of the amendment that its effect is rather the reverse, namely, to extend to salesmen and other employees a liability which under the unamended section attached only to the dealer or producer. In addition, the liability of a dealer or producer under section 6 can under the amendment be avoided by showing that due diligence to prevent the contravention has been exercised The amendment refers to the liability of a dealer or producer, but this liability already existed in absolute terms under the section prior to its amendment Consequently I am unable to agree with Mr. Jayarama Aiyar that the absentee partners can escape liability merely by proof of non-residence in the place where the business was transacted The fact that they were absentee partners and had nothing directly to do with the sales forming the subject-matter of the charges has been recognised by the learned Magistrate in imposing small fines on each of the four charges.

Turning to the fines imposed on the fourth appellant there is no doubt that a penalty of Rs. 8,000 is extremely severe I have asked the learned Crown Prosecutor whether he is in a position to satisfy the Court that these are not isolated offences but are parts of an organised system of black-market transactions. No such information is available nor is he in a position to state that the firm is of such a size that any penalty less than that imposed would be ineffective. Under these circumstances I consider that fines of Rs. 1,000 on each count will be sufficiently severe. The range of profits taken by these illicit transactions exceeded 200 per cent. so that severe sentences are necessary.

In the result the convictions are upheld but the sentences on the fourth appellant are reduced to Rs 1,000 on each of the four counts. In other respects the appeals are dismissed

Mr. Jayarama Aiyar asks for a certificate under section 205 (1) of the Government of India Act on the ground that this case involves a substantial question of law regarding the interpretation of section 317 of the Act. In my opinion the question raised in these appeals turns upon a plain reading of the unambiguous words of the sections involved, and I do not consider that any substantial question of law is involved. The certificate is refused.

V.S. *Appeals dismissed.*

[PRIVY COUNCIL.]

(On appeal from the Chief Court of Oudh.)

PRESENT.—LORD THANKERTON, LORD GODDARD AND SIR JOHN BEAUMONT

Brij Bhushan Singh . *Appellant**

v

The King-Emperor *Respondent*

Criminal Procedure Code (V of 1898), section 164—Statements made under—Purposes for which they could be used—Acceptance of facts deposed to in them in preference to evidence given by the witnesses in Court—Improper use of such statements—Conclusions arrived at cannot be accepted—Privy Council practice—Criminal Appeal—Interference with findings

A statement made under section 164 of the Criminal Procedure Code can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false But that does not establish that what he stated out of Court under section 164 is true

Where the statements under section 164 are discussed in great detail in a judgment and reasons are given for accepting the facts, or most of the facts, deposed to in those statements, in preference to the evidence given by the witnesses in Court, it is quite apparent that the statements were used as substantive evidence of the truth of the facts stated in them It is an improper use of such statements and cannot be justified The conclusions reached on such use of such statements could not be accepted

The Board would not reject the view taken by the Court from which an appeal is brought on the evidence before it, without themselves considering the evidence in detail This is a course which the Board normally refuses to adopt in a criminal appeal unless there is reason for departing from their usual practice of accepting the appreciation of evidence reached by the Court from which the appeal is brought

D N Pritt, K.C and *R. K. Handoo* for Appellant

G D. Roberts, K. C, *W. Wallach* and *B. Mackenna* for Respondent

Argument.

Pritt—I submit at the outset that there was not any evidence to show that Bilasia is dead, no one has ever seen the corpse, witnesses have said that she was seen alive after the beating, and she may well be alive to-day

Lord Thankerton—Will you tell us where the miscarriage occurred

Pritt—That will appear as the story materialises The charges were (1) murder, (2) culpable homicide not amounting to murder and (3) causing evidence of the crime to disappear The charge under section 201, Indian Penal Code had to be tried by jury, on murder and homicide by assessors The crucial date is the 26th May, 1943, the day on which the beating was given On the 30th May, the Appellant's chauffeur was taken into custody, and kept in illegal detention, he was never charged, he made a statement under torture, the statement purported to be made under the provisions of section 164 On the 31st May, 1943, the appellant was arrested for murder and under section 201. On the 1st June, Bhanwar Singh and three others were arrested

The prosecution case falls into two parts, Part I—Homicide, Part II under section 201

Lord Thankerton—Will you crystallize your arguments as to the evidence.

Pritt—There is no evidence as to the girl's death, there is no evidence that she was beaten severely enough as to cause death, lastly the improper use of statements made under section 164, Criminal Procedure Code The evidence of the witnesses shows that there was no evidence of a severe beating and cannot be relied upon for the charge of homicide There is no evidence to show that Bilasia was dead when she undertook the journey from Lucknow to Ramgarh Gularia.

The Chief Court in arriving at the finding that Bilasia had died as a result of the beating, have relied on evidence that was clearly inadmissible, being either hearsay or contained in statements alleged to have been made by certain witnesses under section 164 of the Code of Criminal Procedure Quotes 63 I A 372 at 382. If this inadmissible evidence is rejected the whole of the evidence in the case fails to establish any case against the appellant

Roberts—In *Chainchal Singh* v *The King-Emperor*, (1946) 1 M L J 125, this Board accepted the testimony of witnesses whose evidence had been rejected by the High Court, but accepted by the Sessions Judge In the present case there being the same finding by each Court but on different grounds, therefore it is up to this Board to say which one to believe

The medical evidence as to the bones that were recovered, shows that they may have been Bilasia's

Lord Thankerton—Does the Crown say, that there was evidence as to the disposal of the body that was believed by the Sessions Court, but not by Chief Court, that is asking the Board to appreciate the value of evidence, if the finding of the High Court is maintained against you have you anything left?

Roberts.—This Board is not a Court of Criminal Appeal, *Arnold* v. *King*, 1914 A.C 644 at 648. There is no decision of this Board that it prefers the evidence of one Court to another; is this case

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* P.C. Appeal No 32 of 1945. 17th October, 1945.

any different from that in (1946) 1 M L J 125?

Lord Thankerton —Yes, here you have a finding of the Chief Court against you.

Roberts —There is evidence to support that the midnight journey was not innocent In my submission when the Board looks at the whole facts there is evidence here to justify the finding, therefore there can be miscarriage of justice The Sessions Judge found that they were the bones of a recently dead women, there is always the bogey that the person may turn up, but that is not enough to upset the finding of the Sessions Judge There is no principle to say we are estopped from going behind the finding of the High Court

Wallach followed I wish to refer to certain rulings of your Lordships, before that I should like to call your attention to certain admitted findings

1. Girl was beaten by Singh inside his house, and so severely that she could be heard by the neighbours.

2. The appellant goes out at midnight, for a car ride, the only dispute is whether the girl was dead or alive when she left the house On these facts the Sessions Judge was justified in coming to his finding.

52 I.A. 191 at 195, referred to, there has been no gross miscarriage of justice in the present case.

(Counsel and parties were asked to withdraw On being recalled, Lord Thankerton announced that the appeal would be allowed, reasons would be given later)

Pritt —In view of the exceptionally heavy costs that my client has incurred, Your Lordships should make some order as to costs.

Lord Thankerton.—There will be no order as to costs.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal by special leave against a judgment and order of the Chief Court of Oudh at Lucknow dated the 5th May, 1944, varying as to sentence only an order of the Sessions Judge at Lucknow dated the 10th January, 1944, by which the appellant was found guilty of the offence of culpable homicide not amounting to murder of one Bilasia, his wife's *bandi* maid-servant, under paragraph 2 of section 304 of the Indian Penal Code and was sentenced to six years' rigorous imprisonment, a sentence which, by the said variation, was reduced to a period of about four months which the appellant had already served

At the conclusion of the arguments their Lordships announced that they would humbly advise His Majesty that the appeal should be allowed and that they would give their reasons later. This they now proceed to do

The original charge against the appellant was under section 302 of the said Code for the murder of Bilasia, but he was committed for trial on the charge of culpable homicide not amounting to murder under section 304. In the Court of Sessions, however, the charge was altered to one of murder under section 302, and, although the eventual conviction was under section 304, it was on the charge of murder that the appellant was tried by the Sessions Judge sitting with five assessors.

At the same time, and in relation to the same alleged offence, the appellant separately, and four other persons, who were accused 2—5, jointly, were charged with the offence of causing evidence of the commission of the said offence of murder to disappear, to wit, with the destruction or disposal of the body of Bilasia, knowing or having reason to believe that the offence had been committed, and with the intention of screening the offender from legal punishment, an offence punishable under section 201 of the said Code.

No objection seems to have been taken to the trial of accused 2—5 jointly with the appellant, although it was not suggested that they had taken any part in, or had any knowledge of, the alleged murder by the appellant. However, as these accused were acquitted, this point need not be discussed

Under the provisions of the Criminal Procedure Code and certain regulations of the local government, a charge under section 302 of the Penal Code is triable by a Judge with assessors, and a charge under section 201 is triable by a judge with a jury. At the said trial the same five gentlemen acted as assessors on the main charge and as jurors on the minor charge.

The prosecution case was that on the 26th May, 1943, in the appellant's house at Lucknow, Bilasia had been found in compromising circumstances with the appellant's bearer, one Samuel, and that on this fact being reported to the appellant on

his return from his office at about 7-30 p.m., he gave Bilasia a beating. The prosecution suggested that it was a very severe beating and that it reduced the girl to the point of death. At about 8-30 p.m., the appellant went out to dinner with a friend and returned at about midnight, and the prosecution alleged that by the time Bilasia had died. Thereupon, that is shortly after midnight, the appellant, with his wife and his chauffeur Mahabir, drove in the appellant's car some 60 miles to the house at Ramgarh Gularia of Bhanwar Singh, whose wife, a sister of the appellant's wife had a *bandi* maidservant named Basanti who was a cousin of Bilasia. The prosecution alleged that the dead body of Bilasia was in the boot of the car, and that the object of the journey was to dispose of such body. The prosecution alleged that a mile or two before reaching Ramgarh Gularia the appellant's car had a puncture, and that certain villagers who were passing in a bullock cart took the appellant's party up to the house of Bhanwar Singh; that when the party reached the house, Bhanwar Singh, who was accused 2, sent his servant, who was accused 3, and two Pasis who were accused 4 and 5 with Mahabir to the appellant's car; that they removed the body of Bilasia from the car and concealed it and subsequently dismembered it and scattered the bones in the jungle, and later pointed out such bones to the police.

The appellant admitted that he gave Bilasia a beating on the evening of the 26th May, but alleged that it was a light beating, mainly on the hands and arms, though he gave her one blow on the back as she was running away. He said that he was very angry about Bilasia's conduct since she had been guilty of similar conduct on previous occasions, and that he insisted that his wife should get rid of her at once. He alleged that on his return from his dinner party at about midnight he was very much annoyed to find that Bilasia was still in the house; he refused to have her any longer under his roof and insisted that he and his wife and chauffeur should take her at once to the house of Bhanwar Singh, where she could be handed over to the care of Basanti. On this part of the case the real point at issue between the prosecution and the defence is whether it was Bilasia herself, or Bilasia's dead body which was taken in the car from Lucknow.

The appellant admitted the puncture a mile or two short of Bhanwar Singh's house and said that he and his wife and Bilasia walked the rest of the way to the house, leaving the chauffeur to repair the puncture; that his wife and Bilasia remained at Bhanwar Singh's house, but the appellant himself returned to Lucknow in his car as soon as the puncture was mended.

It is common ground that when the police visited the house of Bhanwar Singh on the 28th May, Bilasia had disappeared, and has not been heard of since. The appellant's story is that she had gone out to the jungle to answer a call of nature and had not returned.

At the trial the jury returned a verdict of not guilty in respect of all the accused upon the charge under section 201, and as assessors they expressed the view that no offence was proved against the appellant under section 302 or section 304. The Sessions Judge did not agree with the verdict of the jury and made a reference to the Chief Court of Oudh under section 307 of the Criminal Procedure Code. On the major charge he convicted the appellant under section 304 as already stated.

The learned Judge in a very full judgment discussed the whole of the evidence in detail. In regard to the beating of Bilasia he summed up his conclusions in these terms:

"This concludes the evidence of the prosecution witnesses regarding the beating. It certainly does not prove that the beating was a severe one, or that Bilasia died as a result of this beating, but I do feel that the manner in which the two ayahs have given their evidence, particularly Mst. Haliman, shows that they are withholding the truth, and the fact must be borne in mind when considering the prosecution evidence as a whole"

At the end of his judgment, however, he expressed the view that the appellant lost his self-control and beat the girl severely with a stick of substantial size. He concluded in these terms:

"Everyone is presumed to know the natural consequences of his actions and the knowledge which I impute to Mr Singh is the knowledge that the excessive beating which he gave Bilasia was likely to cause her death I am not prepared to hold that the offence committed by him is of a lesser nature as there is no reason to assume that Bilasia's death was due to some accidental cause which Mr. Singh could not have anticipated, such as the rupture of a diseased organ Bilasia, so far as the evidence discloses, was a healthy girl and I do not think that there are any good grounds for holding that her death was occasioned by some physical abnormality, the existence of which was not known to Mr Singh The view I take is that Mr Singh beat her recklessly and violently knowing that his blows were likely to cause her death I am therefore of the opinion that he is guilty of the offence punishable under the second part of section 304, Indian Penal Code"

The reason why the learned Judge changed his view as to the severity of the beating established by the prosecution evidence is not clear. He could not act upon evidence which was not given, however much he may have felt that it ought to have been given Their Lordships may observe that the theory which the learned Judge rejected that the girl may have died from an internal injury caused by the beating which manifested itself later in the evening at least afforded a rational explanation of the conduct attributed to the appellant. It is almost inconceivable that if the appellant, an educated man, a member of the Indian Civil Service, had beaten the girl to the point of death, he would have gone out for the evening without taking any steps to ensure that she received medical attention, and that his wife would have concurred in such procedure. Apart from considerations of humanity, he appellant must have realised that the death of the girl would place him in a very serious position

With regard to the evidence as to the disposal of the body the learned Sessions Judge acted, as he was entitled to do, upon his own view of the evidence which the jury had rejected on the lesser charge He accepted most of the evidence of the villagers who were said to have met the party when the tyre punctured and considered that such evidence established that Bilasia was not with the party at that time, a finding which destroyed much of the defence case ; though it is to be noticed that no witness spoke of having seen the dead body of Bilasia With regard to the production of the bones the learned Judge accepted the evidence of their having been pointed out by accused 3—5 and held that the bones might be the bones of Bilasia though he did not hold this to have been definitely proved

On appeal the Chief Court of Oudh rejected the reference under section 307 holding that there was evidence on which the jury were entitled to reach the conclusion they did, and that their verdict was not perverse. The Chief Court, however, went further than this and themselves considered the evidence, as they were right in doing since the evidence as to the disposal of the body might be relevant on the charge under section 304. In the result, they expressed the view that the jury's appreciation of the evidence was correct; they rejected the whole of the prosecution evidence as to the disposal of the body, and held that the bones produced were not those of Bilasia

The Court then considered the evidence as to the killing of Bilasia at Lucknow and held that it was proved that the appellant gave such a beating to Bilasia that it ultimately resulted in her death, and that her dead body was removed in the car though the method of its disposal was not proved. In reaching this conclusion, however, the Chief Court used statements made by the Ayah Haliman and the chauffeur Mahabir under section 164 of the Criminal Procedure Code as substantive evidence of the truth of the facts stated. It is true that in their judgment the learned Judges say "We may add that the statements under section 164 cannot be and have not been used as substantive pieces of evidence but only for such purposes as the law permits." A perusal, however, of the whole of the judgment makes it apparent, in their Lordships' view, that the statements were used as substantive evidence and it was for this reason that the appeal to His Majesty in Council was admitted The learned Judges discussed in great detail the statements made by Haliman and Mahabir under section 164 and gave reasons for accepting the facts, or most of the facts, deposed to in those statements, in preference to the evidence given by the witnesses in Court, which in no way helped the prosecution. This was an improper use of such statements. A statement under section 164 can be used

to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false. But that does not establish that what he stated out of Court under section 164 is true.

Mr. Roberts for the Crown did not attempt to justify the use made by the Chief Court of the statements under section 164 His contention was that two Courts in India have convicted the appellant; that there was evidence to justify such conviction, and that no injustice would be done by upholding it, and that there was no ground upon which this Board should interfere This argument as at first presented ignored the fact that the two Courts in India differed materially in their view of much of the evidence, and ultimately Mr Roberts was constrained to invite the Board to accept the appreciation of the evidence by the Sessions Judge in preference to that by the Chief Court The story which the Chief Court rejected, namely that the body of Bilasia was placed in the Appellant's car and taken as far as the place where the puncture occurred, that the whole party proceeded from that place to the house of Bhanwar Singh leaving the corpse in the unattended car on a frequented road, that Bhanwar Singh without having enjoyed any previous opportunity of considering the matter at once ordered his servants to accompany Mahabir to the car and dispose of the body, and that the servants performed this task without apparently any regard to the serious consequences to themselves which might ensue, is not one calculated to carry conviction upon its own intrinsic merits As a mere matter of probability it would be reasonable to suppose that the dead body, if there was one, was disposed of by the appellant and Mahabir before arriving at Ramgarh Gularia without incurring the risk of introducing outside parties who might prove awkward witnesses; and that the journey to Ramgarh was continued in order to arrange with Bhanwar Singh a suitable story in case inquiries for Bilasia were instituted It is clear that their Lordships could not reject the view which the Chief Court took of the evidence without themselves considering the evidence in detail. This is a course which the Board normally refuses to adopt in a criminal appeal, and their Lordships see no reason in this case for departing from their usual practice of accepting the appreciation of evidence reached by the Court from which the appeal is brought

Upon the finding of the Chief Court that the evidence as to the disposal of the body was unreliable and that the bones produced were not those of Bilasia, the case must rest, as the Chief Court recognised, on the Lucknow evidence as to the beating. On this view of the matter their Lordships find that the prosecution case is not proved. There is no evidence that Bilasia was beaten very severely; no one saw her in a state of collapse, and no one saw her dead body, and there is no evidence sufficient to justify a finding that Bilasia is dead It is true that both the Courts in India disbelieved the reason given by the appellant to explain the midnight motor-car journey, holding that it was untrue and, indeed absurd, to suggest that such a journey was undertaken because the appellant could not face passing another night under the same roof as Bilasia; and their Lordships entirely concur in his view The fact, that a long motor-car journey was undertaken in the middle of the night, and that a false reason was given in explanation, raises a suspicion that the object of the journey may have been to dispose of the dead body of Bilasia, and that suspicion is much strengthened by finding that from the time when the motor-car left the appellant's house, Bilasia was never seen alive by any independent witness, and that admittedly she had disappeared the next day The appellant has only himself to blame for much of the course which the case has taken But suspicion is not proof It is impossible to say that the only legitimate inference to be drawn from this motor-car journey and the disappearance of Bilasia, is that the appellant killed Bilasia Their Lordships are of opinion that the appeal must be allowed and the conviction of the appellant quashed and they have humbly advised His Majesty accordingly.

Solicitors for Appellant: *Hy. S L Polak & Co.*

Solicitors for Respondent: *The Solicitor India Office.*

H.J U./V.S ——— *Appeal allowed*

[PRIVY COUNCIL.]

(On Appeal from the Court of Common Pleas, Barbados.)

PRESENT :—LORD THANKERTON, LORD GODDARD AND SIR JOHN BEAUMONT.

The Advocate Co , Limited .. *Appellant**

v.

Arthur Leslie Abraham .. *Respondent.*

Tort—Libel action—Meaning of words—Witnesses if can be asked as to the meaning they attach to them—Respective functions of Judge and Jury—Words spoken of a class or body of persons—Right of a member of that class or body to sue in respect of them—Damages—Amount—Interference by appellate tribunal—Justifying circumstances.

Where a plaintiff in a libel action alleges that though he is not mentioned by name he is the person at whom an alleged libel is aimed, or where a name is mentioned that it would be understood by those who know him to refer to him, witnesses can be called to prove that they understood the words to refer to the plaintiff But they cannot be asked what meaning they attached to the words because that is the very question the jury have to decide Where such questions have been allowed to be put without any objection it would be too late, to raise the question in the appellate Court of their admissibility as a ground for setting aside the verdict of the jury.

The respective functions of Judge and Jury in actions for defamation are well established The Judge is to say whether the words are capable of a defamatory meaning and are capable of being defamatory of the plaintiff. It is for the jury to say whether they are defamatory and defamatory of him.

Where it is pleaded in defence that the words were published of a body of persons, if on a fair construction they are spoken of a class or body of persons, an individual member of that class or body cannot sue in respect of them unless there are circumstances that show that they may be aimed at him

While the assessment of damages is particularly within the province of the jury the amount must bear some relation to the damage suffered Where it is so excessively high or so inadequate as to amount to a wholly incorrect estimation, an appellate tribunal will interfere In libel damage is presumed and no doubt punitive or, as they are sometimes called, vindictive damages may be given, but extravagance is not to be permitted.

Sergeant Sullivan & Valentine Holmer for Appellant.

R. F Levy & H Williams, for Respondent

Their Lordships' Judgment was delivered by

LORD GODDARD —The action out of which this appeal arises was brought by the respondent to recover damages for libel published by the appellants of him in their newspaper the " Barbados Advocate " He complained of two publications, one in the issue of 3rd April, 1943, and another in that of 15th April The action was tried before the Chief Justice of Barbados and a special jury. His Honour held that the publication of 15th April was not defamatory of the respondent and withdrew it from the jury There is no cross appeal so it is unnecessary to refer to it further. He left the other alleged libel to the jury, who gave a verdict for the respondent with £ 2,296-5-0 as damages, a curious sum considering that no special damage was alleged, and judgment was entered accordingly. The appellants appeal on the grounds (1) that the words were incapable of a meaning defamatory of the respondent ; (2) that inadmissible evidence was received in that all the witnesses for the respondent were asked and stated the meanings they attached to the words: and (3) that the damages were excessive Before setting out the facts it will be convenient to deal with the second of these grounds

All the witnesses were asked not only to whom they understood the words to refer but also what meaning they attached to them Where a plaintiff alleges that though he is not mentioned by name he is the person at whom an alleged libel is aimed, or where a name is mentioned, that it would be understood by those who know him to refer to him, witnesses can be called to prove that they understood the words to refer to the plaintiff But they cannot be asked what meaning they attached to the words because that is the very question the jury have to decide The Chief Justice ought to have disallowed those questions, but no objection was taken to them, and it is now too late to raise the question of their admissibility as a ground for

* P. C. Appeal No. 38 of 1944. 9th October, 1945.

setting aside the verdict. Moreover His Honour in a full and careful summing up, of which no exception can be taken, put the proper question to the jury, namely, what would a reasonably intelligent person understand the words to mean

Turning now to the facts of this case, it appears, that there had been considerable criticism in the Colony as to the appointments of assistant superintendents of police, and in particular to the recent appointment of a member of the Palestine Police to one of these positions in Barbados in preference to a candidate who was already serving in the Island police force The Government published an explanation of the reasons which influenced these appointments, which appeared in the "Trinidad Guardian" on 25th March. At this time there were two, and only two former members of the Palestine Police occupying these appointments in Barbados, the respondent who had been in the Colony for some five years, and Captain Holmes-a'-Court. On 3rd April the following letter appeared in the appellants' newspaper which circulates in Barbados:—

"POLICE OFFICERS.

"To the Editor:

"Sir,—I have just read to my utter dissatisfaction and surprise, in one of the local newspapers, a reproduction of what is termed therein 'Appointment of Barbados Police Officers explained.' I must state, that to me, the reason given for the recommendation of the local candidate being appointed in some Force other than the Barbados Police Force is as perforated as a strainer

"Is there a more beloved and popular Police Officer in Barbados than the Deputy Commissioner, Major Goddard? Certainly not From whence came this worthy gentleman? The ranks of course Well, then, how can anyone be so short-sighted as to presume that we Barbadians of all other people would not give unto one of our own people the maximum support should the occasion arise, especially when we are aware of the fact that that person is reflecting credit on our sons of the soil?

"It is quite obvious that if one of our people is considered worthy of filling such a responsible position, our first conclusion must definitely be that he is at least twice as capable as the outsider who may be some Lance or Full Corporal in the Palestine Police Force, the majority of whom I have been either fortunate or unfortunate to encounter, can scarcely conjugate more than six or eight of the verbs of their own language, and who, when they try to explain an idea for thought verbally never succeed without the inclusion of a sickening amount of verbosity

"Our Junior N C O is on the spot, he has the qualification plus a perfect understanding of the mentality of the people of the colony and long association with members of the Force, promote this man and give him a chance to prove whether or not he is capable of winning the affections of his compatriots were-seniors and associates before presuming that they would make it hard for him to succeed in the position Should he fail, then you would have something to sing about, then you would have a reason for bringing into the Colony your Palestinic Lance-Corporal, who for the most part of all he would bring with him would be a strange accent and a riding-suit, to be taught among other things his job by the local unfortunate junior N C O

"I earnestly hope that the representatives of the people will take this matter seriously keeping before them the fact that they themselves are Barbadians and not members of the Palestine Police Force

"Thanking you for space,
"I am, Sir,
"Very sincerely yours,
"A BARBADIAN.

"26th March, 1943
"Trinidad."

To this the respondent and his brother officer took exception, conceiving it to be aimed at them as the only two police officers in Barbados who had previously served in the Palestine Force They consulted solicitors who, on 15th April, wrote demanding (1) a full and complete apology to be published in the paper and to be settled by the solicitors; (2) an undertaking to refrain from publishing further defamatory matter of the two officers; (3) a substantial sum for damages and costs Thereupon the appellants published an apology in their issue for 17th April, which though not settled by the respondent's solicitor was in these terms:

"AN APOLOGY.

"It has been drawn to our attention that a letter appearing in the 'Advocate' of 3rd April under the caption 'Police Officers' has been the cause of considerable annoyance to two of our local Police Officers. We unhesitatingly tender our apologies to these two officers. In the letter referred

to the writer belittled the intelligence and efficiency of the majority of the members of the Palestine Police Force whom he had met and we regret that they should have felt that the attack was directed against them.

"It is obvious to anyone with a nodding acquaintance with Captain Abraham and Captain Holmes-a'-Court that our correspondent had never met these Officers, who are highly efficient police officers and men of high intellectual attainments respected by all sections of the community not only for these qualities, but for their easy adaptability to local conditions and their eagerness to enter into every phase of social life in the colony

"It was not so long ago that the 'Advocate' in an article in reply to an attack on members of the 'Palestine Police Force' published in the 'Antigua Magnet', stated that, whatever may have been the experience in other colonies the members of that Force transferred to Barbados were intelligent, gentlemanly and efficient officers and a credit to the local force

"Holding the same opinion to-day we again tender our sincere apologies for any inconvenience and annoyance which our correspondent's letter may have caused."

Their Lordships will refer to this apology when they come to deal with the question of excessive damages

The respective functions of judge and jury in actions for defamation are well established and were accurately stated by His Honour at the outset of his summing up. The Judge is to say whether the words are capable of a defamatory meaning and are capable of being defamatory of the plaintiff. It is for the jury to say whether they are in fact defamatory and defamatory of him. It was submitted by Counsel for the appellants that these words were incapable of defaming the respondent; they were published, he contended, of the Palestine police as a body and not of any individual member or members of that body, least of all of the respondent Their Lordships need not enter into a full exposition of the law on this matter, as it was the subject of a recent decision of the House of Lords in *Knupper* v *London Express Newspaper, Ltd*,[1] and passages from the speeches were read by His Honour to the jury It is enough to say that if on a fair construction the words are spoken of a class or body of persons, an individual member of the class or body cannot sue in respect of them unless there are circumstances that show that they may be aimed at him If they may be in all the circumstances, the Judge must leave it to the jury to say if they are in fact Among such circumstances may be the smallness of the class referred to, so that it could fairly be said that all its members are aimed at. Here there are but two police officers in Barbados who had previously served in Palestine and the plaintiff is one of them The letter is written by a person calling himself "A Barbadian," published in a Barbados newspaper in relation to the appointments to the force in that Island of police officers from Palestine In these circumstances their Lordships are of opinion that His Honour was amply warranted in leaving the case to the jury He gave them full and clear direction on the matter and there is no ground on which the verdict for the plaintiff can be disturbed.

Reluctant as an appellate tribunal always is to interfere with the amount of damages, it appears to their Lordships that the jury's award is so excessive and unreasonable that it cannot be allowed to stand. While the assessment is particularly within the province of the jury the amount must bear some relation to the damage suffered Where it is so excessively high or so inadequate as to amount to a wholly incorrect estimation an appellate tribunal will interfere It is enough to refer to *Greenlands* v *Wilmshurst*,[2] and *Flint* v *Lovell*[3], where the principle is explained. In libel damage is presumed and no doubt punitive or, as they are sometimes called, vindictive damages may be given, but extravagance is not to be permitted. Here there was a prompt apology, full and ample, and containing an appreciation of and testimonial to the respondent Their Lordships confess to some surprise that after its publication the respondent thought it necessary to bring this action His brother officer was apparently satisfied, and it is to be observed that in his evidence the respondent stated that money was not his object Actual damage there was none; for the annoyance, in view of the apology, many would think

1. (1944) A C 116
2. (1913) 3 K.B. 507 at p. 532.
3. (1935) 1 K B 354.

£100 an extreme limit. Double or even treble it for sympathy, indignation or what you will the result bears no relation to what the jury gave.

Their Lordships are of opinion that this appeal should be in part allowed; that the verdict of the jury and the judgment should be set aside in so far as it relates to the amount of damages, and that there should be a new trial limited to the amount of damages to be awarded to the respondent. As to costs the appellants have failed before this Board in their appeal as to liability, which was the principal subject of the appeal On the other hand the respondent endeavoured to uphold the amount of damages awarded, and in this he has failed. Accordingly their Lordships think that the proper order should be that the appellants should pay the respondent one-half of his costs of this appeal The costs of the new trial will be in the discretion of the judge who tries it. They will humbly advise His Majesty accordingly.

Solicitors for Appellant · *Minnet, May & Co.*

Solicitors for Respondent: *Rashleigh, Turner, Mann & Rosher*

H.J.U./V S. ——— *Appeal allowed in part.*

[FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Calcutta.)

PRESENT —SIR PATRICK SPENS, *Chief Justice*, SIR S VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ

Biswanath Khemka .. *Appellant**

v

The King-Emperor . *Respondent.*

Government of India Act (1935), *section* 256—*Proper authority directed to be consulted under—Direction not mandatory—Non-compliance with—Appointment not rendered ineffective*

When it is proposed to grant magisterial powers or enhanced magisterial powers to a person, the proper authority to be consulted in pursuance of the direction contained in section 256 of the Constitution Act is the District Magistrate of the District in which the person concerned is working at the time when the recommendation is made or the Chief Presidency Magistrate if the person concerned is at the time working under him

The services of a Magistrate were borrowed from another Province, and on these being placed at the disposal of the Bengal Government, he was appointed Additional Presidency Magistrate at Calcutta On a contention that his appointment was made without consulting the Chief Presidency Magistrate, Calcutta, and was therefore ineffective and inoperative,

Held, that in the circumstances the consultation should have been made with the District Magistrate of the District in which the Magistrate concerned was working in his own province when the question of his appointment came under consideration and in the absence of anything to show that such consultation did not take place, it could not be contended that the direction contained in section 256 was not complied with

Held further, that the direction laid down in section 256 was directory and not mandatory, and non-compliance with it would not render an appointment otherwise regularly and validly made ineffective or inoperative

Sardar Sant Singh, Advocate, Federal Court, instructed by *Ganpat Rai*, Agent, for Appellant.

B. Banerji and *N K Sen*, Advocates, Federal Court, instructed by *P. K. Bose*, Agent, for Respondent (the Government of Bengal).

The Judgment of the Court was delivered by

Zafrulla Khan, J—The appellant along with six other persons is being tried before an Additional Presidency Magistrate, Calcutta, on charges of Hoarding and Profiteering under rule 81 (4) read with rule 122 of the Defence of India Rules. During the course of the trial he applied to the Chief Presidency Magistrate, Calcutta, for transfer of the cases from the file of the trying Magistrate One of the grounds urged in support of the application for transfer was that the appointment of the

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* Criminal Appeal No. I of 1945. 9th April, 1945.

Magistrate was irregular and therefore ineffective, as it had not been made in accordance with the conditions prescribed by section 256 of the Constitution Act, and that, therefore, the Magistrate had no jurisdiction to try these cases or indeed any case at all The application was dismissed by the Chief Presidency Magistrate. The appellant thereupon moved the Calcutta High Court in revision with no better result. This appeal was preferred against the order of the Calcutta High Court supported by the requisite certificate under section 205 of the Constitution Act.

The sole question argued before us related to the interpretation and effect of section 256 of the Constitution Act which runs as follows·

> "No recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to or the withdrawal of any magisterial powers from, any person save after consultation with the district magistrate of the district in which he is working, or with the Chief Presidency Magistrate, as the case may be"

It was contended that the appointment of the Additional Presidency Magistrate trying these cases was made without consulting the Chief Presidency Magistrate, and was therefore ineffective and inoperative In our judgment, the section does not direct consultation with the Chief Presidency Magistrate when it is proposed to grant magisterial powers or enhanced magisterial powers to a person who is not at the ime when the recommendation is made, working as Presidency or Additional Presidency Magistrate The authority to be consulted in pursuance of the direction contained in the section is the District Magistrate of the District in which the person concerned is working at the time when the recommendation is made or the Chief Presidency Magistrate if the person concerned is at that time working under him In this case the services of the Magistrate concerned were borrowed from another Province, and on these being placed at the disposal of the Bengal Government, he was appointed Additional Presidency Magistrate at Calcutta. In these circumstances we are of the opinion that the consultation prescribed by section 256 should have been made with the District Magistrate of the District in which the Magistrate was working in his own Province at the time when the question of his appointment as Additional Presidency Magistrate, Calcutta, came under consideration. There is nothing on the record to indicate that such consultation did not take place There is thus no foundation for the contention that the direction contained in section 256 was not complied with

We are further of the opinion that the direction laid down in section 256 is directory and not mandatory, and that non-compliance with it would not render an appointment otherwise regularly and validly made ineffective or inoperative It seems to us that any other view would lead in many cases to results which could not have been intended by Parliament and would entail general inconvenience and injustice to persons who have no control over those entrusted with the duty of making recommendations for the grant of magisterial powers (see *Montreal State Railway Company* v *Normandin*[1]).

A preliminary objection was taken on behalf of the Crown that the appeal was incompetent inasmuch as the order of the High Court appealed against was not a judgment or final order within the meaning of section 205 of the Constitution Act Reliance was in support of the objection placed on the observations of Sulaiman, J., in *Hori Ram Singh* v *The Crown*[2] Reference was also made to *Venugopala Reddiar and another* v *Krishnaswami Reddiar*[3]. As we have come to the conclusion that there is no substance in the appeal on the merits, we do not consider it necessary to deal with the preliminary objection No other question was sought to be raised before us

The appeal fails and is dismissed.

G.R /V S. ——— *Appeal dismissed.*

1 (1917) A C 170 at pp 174-175
2 (1939) F C R 159 2 F L J 153 (1939) M L J 57
3 (1943) F C R 39 · 6 F L J 47 (1943) 2 M.L.J. Supp. 23.

[FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Patna)

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLAH KHAN, JJ.

Sarjoo Prasad . *Appellant**

v

The King-Emperor (through Bidyanandan Singh) *Respondent.*

Government of India Act (1935), *section* 270 (1)—*Applicability—Test—Materials to be referred to—Act 'purporting to be done'—What would not amount to*

As the prohibition contained in section 270 (1) of the Constitution Act is against the institution of proceedings itself, the applicability of the section must be judged at the earliest stage of institution

Where the complaint against a station master was that he refused to issue tickets to the complainant on the ground that it was too late and behaved in an uncivil manner and showed furious temper and that on the complainant resenting such things the accused "called out a man *K* by name and other coolies and ordered them to beat" the complainant and that they and the accused also assaulted the complainant and his brother,

Held, applying the test laid down in *Hori Ram Singh* v *The Crown*, (1939) 2 M L J (Supp) 23, that it could not be held on the allegations in the complaint that the acts complained of, can be regarded even as one "purporting to be done" by the accused in execution of his duty within the meaning of section 270 (1) of the Constitution Act.

Nageshwar Prasad, Senior Advocate, Federal Court (*Tarakishore Prasad*, Advocate, Federal Court, with him) instructed by *Tarachand Brijmohanlal*, Agent, for Appellant

Mahabir Prasad, Advocate-General of Bihar (*Tarkeshwar Nath*, Advocate, Federal Court, with him) instructed by *S P Verma*, Agent, for Respondent

The Judgment of the Court was delivered by

Spens, C J—The only question which it is necessary to decide in this appeal is whether the proceedings out of which the appeal arises are "in respect of any act done or purporting to be done in the execution of his duty" by the appellant as a servant of the Crown (section 270 (1) of the Constitution Act).

The appellant was a station master at a steamer station on the O T. Railway. The complaint alleges that on 25th July, 1944, the complainant with his wife and certain others proceeded to the station a short time before the steamer was due to leave, that he went to the booking office to purchase tickets, asking his wife and the rest of the party to wait at the jetty along with the luggage, that the booking clerk declined to issue tickets alleging that it was very near the time fixed for the steamer's departure and that when he went to the jetty he found that his wife and the other people had already boarded the steamer with the luggage and accordingly he asked the station master to arrange for the issue of the tickets required It will be convenient, in view of the arguments urged before us, to set out the rest of the complaint in full "He (the station master) gave a flat refusal and said that he could not do anything in the matter and when your petitioner repeated his request, he got annoyed and asked your petitioner to get out and then your petitioner wanted to go on the steamer to bring back the ladies and the luggage but the accused No 1 (station master) resisted your petitioner's going on the steamer and showed unsympathetic attitude and furious temper and went to the length of abusing your petitioner calling bad names such as "*Badmash*", "*Tum Kahan Jata Hai*", "*Steamer per jaoge tab mar khaoge*" "(6) That your petitioner resented this and protested against the uncivil behaviour whereupon accused No 1 called out a man Khalifa by name and other coolies and ordered them to beat your petitioner and on the order being issued accused No. 2 Khalifa and some coolies began to assault your petitioner and his companions The accused No 1 also assaulted your petitioner with slaps and gave fists and blows on the body of your petitioner and your petitioner's brother" After the appellant had been summoned, the magistrate expressed the view that sanction under section 270 (1) of the Constitution Act was necessary for the institution of these proceedings The complainant applied to the Government of Bihar for sanction ; he was informed in reply "that he should seek his remedy in the superior Courts if his complaint is dismissed." On production of this order,

* Criminal Appeal No. III of 1945. 9th November, 1945.

the magistrate discharged the accused, though it is not on record how exactly he interpreted this order.

On application to the Sessions Judge for further enquiry, he was of the opinion that no sanction was necessary in the case and he accordingly ordered a further enquiry. The station master carried the matter on revision before the High Court at Patna. The learned Judge of the High Court (Agarwala, J.) dismissed the petition, holding that section 270 (1) could not be invoked in respect of an offence committed in 1944 because the "relevant date" referred to in that clause must be taken to be the date of Part III of the Act coming into force, *viz.*, 1st April, 1937. This appeal has been filed against this order of the learned Judge and the correctness of his interpretation of the expression "relevant date" in its application to a railway servant has been questioned.

It has been contended that a railway servant is not a person "employed about the affairs of a Province" but one "employed about the affairs of the Federation" that according to clause (3) of section 270, "the relevant date" in the applicant's case must be held to be the date of the establishment of the Federation and that therefore the act complained of is one done before the "relevant date". By way of answer to this contention, it has been suggested that on a proper reading of clause (1) of section 270 the benefit of that section can be invoked by servants of the Central Government only when proceedings are instituted *after* the establishment of the Federation in respect of acts done before the date of the establishment of the Federation. It is unnecessary for the purposes of this case to decide this question, because we are of the opinion that the act complained of in this case cannot be held to be one "done or purporting to be done" in the execution of the appellant's duty as a servant of the Crown.

The materials with reference to which the applicability of section 270 (1) must be considered were indicated in the judgment of this Court in *Hori Ram Singh* v. *The Crown*[1]. It was pointed out by Sulaiman, J., that as the prohibition was against the institution itself, the applicability of the section must be judged at the earliest stage of institution. The learned Judge then proceeded to say "if the prosecution case as disclosed by the complaint or Police report, as the case may be, shows that the act purported to be done in execution of duty, the proceedings must be dropped. But if the prosecution case does not involve this, the case cannot be thrown out on the preliminary ground of want of consent" (Page 179: *see also* pp. 184 and 185). Applying this test, we are unable to hold that on the allegations in the complaint, which we have above set out, the act complained of can be regarded even as one "purporting to be done" by the appellant in execution of his duty.

Counsel for the appellant drew our attention to sections 68 and 113-A of the Indian Railways Act and to chapter IV, rule 2, of the Bengal and North-Western Railway Traffic Manual and contended that the station master believed that he was exercising the powers and duties imposed upon him by these provisions and that he was entitled to the protection afforded by section 270 (1) even if he erroneously thought that these provisions justified his conduct. We do not propose to discuss the bearing of these provisions on the case. As observed by Sulaiman, J., in the judgment already referred to, "The mere fact that the accused proposes to raise a defence of the act having purported to be done in execution of duty would not in itself be sufficient," to justify the case being thrown out for want of sanction under section 270 (1). Counsel for the appellant further contended that reading the complaint in the light of the statement made by the complainant before the magistrate we must hold that the complaint itself discloses that the act purported to be done in execution of duty. We are not satisfied that this is so. On the language of paragraph (6) of the complaint set out *supra* there is no room for any suggestion of ambiguity as to the case alleged against the appellant.

The appeal fails and is dismissed.

G.R./V.S. — *Appeal dismissed.*

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1. (1939) F.C.R. 159: 2 F.L.J. 153 (F.C.): (1939) 2 M.L.J. (Supp.) 23.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Pulavarthi Venkata Subba Rao and others .. *Petitioners**

v.

Valluri Jagannadha Rao and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 2 (11)—Legal representative—Hindu widow entitled to an interest in her husband's estate under the Hindu Women's Rights to Property Act (XVIII of 1937)—If a "legal representative" entitled to be brought on record

A Hindu widow taking an interest in her husband's estate which devolves upon her under the Hindu Women's Rights to Property Act, would be his "legal representative" within the meaning of section 2 (11) of the Code of Civil Procedure, and is as such entitled to be brought on record as a person who in law represents the estate of her deceased husband who was a defendant in a suit

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Narsapur dated 9th December, 1944 and made in C.M.P. No. 608 of 1943 in O S. No. 52 of 1941.

V. Viyanna for Petitioners.

Respondents not represented.

The Court delivered the following

JUDGMENT.—This is a revision petition against the order of the Subordinate Judge of Narsapur refusing to add the widow of the deceased first defendant as a party defendant in O.S. No. 52 of 1941 on the ground that she is not a legal representative of her deceased husband. The respondents, the defendants in the suit, are not represented in this Court and the civil revision petition has been heard in their absence. The suit was by the creditors who impleaded the first defendant and his two undivided sons, the second and third defendants The first defendant died *pendente lite* on the 17th May, 1943, and an application was made for bringing on record his two sons (defendants 2 and 3) and his widow, as the legal representative of the deceased defendant The learned Subordinate Judge directed that the second and third defendants should be recognised as the legal representatives of their deceased father but so far as the widow was concerned he dismissed the application holding that she was not her deceased husband's legal representative

The expression 'legal representative' has been defined in section 2 (11) of the Civil Procedure Code and the part of it that is material to the present case is that it means "a person who in law represents the estate of a deceased person". This expression was not defined in the Code of 1882 There was considerable divergence of judicial opinion as regards it true connotation. An authoritative definition was given by the Calcutta High Court in *Dinamoni Chaudhurani* v *Elahadut Khan*[1] Woodroffe, J., who was a party to that decision pointed out that, although at one time only an executor or an administrator could be treated as legal representative, the Courts began to apply that expression to ordinary cases of succession without strictly confining it to its primary meaning. After a scrutiny of the English and Indian cases Woodroffe, J., observed that where there is an executor or administrator they alone are the legal representatives of a deceased judgment-debtor and that the term is otherwise commonly applied both in the case of heirs as well as in that of executors and administrators. The principle was further extended to the case of a person who without title as administrator, executor, heir, reversioner or surviving coparcener was the *de facto* possessor of the estate of the deceased Hindu, it having been held that he must be treated for some purposes as his representative and that a judgment obtained against such a representative is not a mere nullity. In the end the learned Judge summarised the legal position thus

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* C. R. P No. 541 of 1945. 18th December, 1945.

1. (1904) 8 C.W.N. 843.

"From this review of the authorities it will appear that judicial decisions have extended the sense of the term 'legal representative' beyond that of its ordinary meaning of 'administrator, executor and heir' and though such expression has been attended with doubt and has in some cases been the subject of conflicting decision, it appears to me to be too late now to endeavour, however convenient it might be, to secure for the term that which is perhaps its strict and legitimate sense I agree, therefore, in holding that the term is not limited to administrators, executors and heirs and I am of the opinion that it must now be held to include any person who in law represents the estate of a deceased judgment-debtor"

It would be seen that it is this particular *dictum*, that appears to have been actually adopted in framing that part of the definition of 'legal representative' which has been extracted above, namely, that a 'legal representative' means a person who in law represents the estate of a deceased person.

The further question is how the enactment of the Hindu Women's Rights to Property Act (XVIII of 1937) affects the position Under section 3 (2) of that Act as amended by Act XI of 1938, when a Hindu, governed by Mitakshara School of Hindu Law, dies having at the time of his death an interest in a Hindu joint family property, his widow, subject to the provisions of sub-section (3), gets in the property the same interest as her husband himself had Sub-section (3) stipulates that that interest devolving on a Hindu widow shall be the limited interest known as a Hindu women's estate, provided, however, that she will have the same right of claiming partition as a male owner With reference to the repercussions of this enactment on the Hindu law doctrine of coparcenership, Mayne says that as a result of this statutory provision the undivided interest of a coparcener who leaves a widow goes to her as his heir for the limited estate of a Hindu woman, but it does not go by survivorship for the obvious reason that

"she cannot be in the strict sense a coparcener with the other members, her position will be analogous to that of a member of an undivided family under the Dayabaga law with this possible difference that, as she is only to have the same interest as her husband himself had, the share to which she will be entitled at a partition may be liable to the same fluctuation caused by changes in the family as if she occupied the place of her husband."

The learned author treats the devolution provided by the Act as one in the nature of succession. He treats the widow as in the position of an heir to her deceased husband

"When a widow," says the author, "succeeds to her husband's interest in a joint family, she takes it only by inheritance and not by survivorship"

Again it is said :

"To hold that the widow of a coparcener who takes his interest on his death is strictly a tenant-in-common with the coparcenary body is not to give full effect to the words in section 3 (2), according to which she is to have 'in the property the same interest as he himself had' apart from the grave complications which it will involve On that view, she will be entitled to an account and for a definite share of the income while the others will not be, more than that, it will lead to anomalies and hardships in connection with the allotment of shares, and even before partition there would be separate management and representation and separate incurring of debt But evidently the intention of the Act is only to interrupt survivorship and to protect the right of a widow so that she may have the same interest as if she continued the legal *persona* of her husband till partition" (Mayne's Hindu Law, 10th Edition, page 721)

In the end the conclusion of the learned author is that the Act confers upon the widow a right of succession notwithstanding any rule of Hindu law and as such an unchaste widow will not be disqualified from inheritance, and that she would be entitled to succeed, notwithstanding any ground of disqualification under Hindu law in either school

The lower Court relied on the decision of this Court in *Natarajan Chettiar* v. *Perumal Ammal*[1], where Horwill, J., held that

"the effect of section 3, clauses (2) and (3) may be regarded as recognising a survival of the husband's *persona* in the wife giving her the same rights as her husband had, except that she can alienate property only under certain circumstances"

The learned Judge held that the widow did not obtain her right by survivorship or by inheritance but she got it as a result of the statutory provision which was

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1. (1942) 2 M.L.J. 668.

based upon the principle, as remarked by Mayne, of the survival of the husband's *persona* in the wife The position amounts to the same whether it is called a statutory devolution or success on, the result being eventually that the widow takes that interest which devolves upon her as a person representing the estate and interest of her deceased husband I am of the opinion that in these circumstances a widow would be a "legal representative" within the meaning of section 2 (11) of the Code of Civil Procedure, and is as such entitled to be brought on record as a person who in law represents the estate of her deceased husband.

The reasons given by the learned District Munsiff for disallowing the costs of the petitioner in civil revision petition No. 1530 of 1943 of this Court are not satisfactory The result would be that this petition will be allowed with costs here and in the lower Court as well as in C.R.P No 1530 of 1943

K S — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI

The Commissioner of Income-tax, Madras .. *Applicant**

v.

Sri Visweswaradas Gokuldas .. *Respondent.*

Income-tax Act (XI of 1922), *section* 13—*Method of accounting—Alteration—Duty of Income-tax Officer.*

The proviso in section 13 of the Income-tax Act gives the Income-tax Officer full liberty of action if he is satisfied that the method adopted by the assessee does not allow of a correct assessment of the profits When he is of this opinion it is his bounden duty to adopt another method, a method which he considers will permit of a satisfactory assessment

Commissioner of Income-tax, Bombay v. *Sarangpur Cotton Manufacturing Co , Ltd , of Ahmedabad,* (1938) 1 M L J. 1 . L R 65 I A 1 I L R 1938 Bom 239 (P C) referred to

An assessee up to the end of *samvat* year 1994, had adopted as the method of accounting for income-tax purposes the practice of valuing his stocks at the cost price He made a change in respect of the *samvat* year 1995 and opened the account with stocks valued at cost price and closed it with a valuation at the market price The Excess Profits Tax Act had come into operation in that year. The assessee's return was accepted But in the following year, the Income-tax Officer discovering that he had made a mistake in accepting the method of accounting of the assessee, assessed the assessee for that year on the basis of the cost price of the stock On an objection that the Income-tax Officer should have adopted the method which had been adopted in the previous year,

Held, that the Income-tax Officer was in law entitled to adopt the course he did in respect of the *samvat* year 1996 Taking the stock of the *samvat* year 1995-96 at the market price was not in accordance with the assessee's regular method of accounting In the circumstances the Income-tax Officer took the proper course in valuing the stocks at the cost price, at the same time offering to rectify the assessment for the previous year under the provisions of section 35 of the Act

Case referred to the High Court by the Income-tax Appellate Tribunal, Bombay, under section 66 (1) of the Indian Income-tax Act (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act (Act VII of 1939) in 66 R.A. Madras 29 of 1944-45 on its file

C. S Rama Rao Sahib for Applicant.

P. R. Srinivasan for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The assessee is a merchant dealing in metals. Up to the end of the *samvat* year 1994, that is up to 23rd October, 1938, he adopted as the method of accounting for income-tax purposes the practice of valuing his stocks at the cost price. Both at the beginning and at the end of the year the cost price was taken. In respect of the *samvat* year 1995 (20th October, 1938 to 11th November, 1939) the assessee made a change. He opened the account with stocks valued at cost price and closed it with a valuation at the market price The market price was much higher than the cost price and this resulted in showing an increase in the profits to the extent of Rs 24,797. The object of the change in the method of accounting is not far to seek. The Excess Profits Tax Act had come into operation. It actually

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* Case Referred No. 7 of 1945. 14th December, 1945.

came into force on the 13th April, 1940, but the Legislature applied its provisions from the 1st September, 1939. The Income-tax Officer accepted the assessee's return for the *samvat* year 1995, which corresponded to the year of assessment 1940-41. In the following year the Income-tax Officer discovered that he had made a mistake in accepting the method of accounting which the assessee had adopted for the year 1940-41 Consequently for the *samvat* year 1996 (1941-42) the Income-tax Officer assessed the assessee on the basis of the cost price of the stock He took the cost price at the beginning of the year and at the end of it, which meant the addition of Rs 24,885 to the total income. The assessee objected and said that the Income-tax Officer should have adopted the method which had been adopted for the previous year. He appealed to the Assistant Commissioner of Income-tax without success, but on a further appeal to the Income-tax Appellate Tribunal, Madras Bench, he was successful At the request of the Commissioner of Income-tax, the Tribunal has referred to this Court under section 66 (1) of the Income-tax Act, the following question .

> "Whether in the circumstances of the case the assessment made by the Income-tax Officer for 1941-42 by adding the sum of Rs 24,885 to the total income of the respondent by revising valuations of the opening and closing stocks of *samvat* year 1996 on cost basis was legal."

Section 13 of the Income-tax Act, 1922, deals with the method of accounting It says that income, profits and gains shall be computed for the purposes of sections 10 and 12 in accordance with the method of accounting regularly employed by the assessee, provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced from it, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine The proviso gives the Income-tax Officer full liberty of action if he is satisfied that the method adopted by the assessee does not allow of a correct assessment of the profits. When he is of this opinion it is his bounden duty to adopt another method, a method which he considers will permit of a satisfactory assessment. This was pointed out by the Privy Council in the *Commissioner of Income-tax, Bombay* v *Sarangpur Cotton Manufacturing Co., Ltd , of Ahmedabad*[1].

In the *Commissioner of Income-tax, Madras* v. *Chengalvaraya Chetti*[2], this Court held that it was an accepted rule that the assessee in crediting the closing stock figure is to take either the cost price or the market price whichever be the less—a provision obviously intended to be in favour of the trader and one which enables him more evenly to distribute his loss.

Taking the stock of the *samvat* year 1995-96 at the market price was not in accordance with the assessee's regular method of accounting His regular method had been to take the cost price both at the beginning and at the end of the year. Moreover the market price was admittedly far higher than the cost price. In these circumstances the Income-tax Officer took the proper course in valuing the stocks at the cost price, at the same time offering to rectify the assessment for the previous year under the provisions of section 35 of the Act. We hold that the Income-tax Officer was in law entitled to adopt the course which he did in respect of the *samvat* year 1996 and accordingly we answer the question referred in the affirmative

The learned counsel for the Commissioner of Income-tax has given an undertaking to the Court that the assessment for the year 1940-41 will be revised. In respect of that year also the stock will be valued at the opening and at the close of the year at the cost price and the tax repayable to the assessee on this basis will be adjusted.

The Commissioner of Income-tax is entitled to the costs of this reference, which we fix at Rs. 250.

V.S. — *Reference answered.*

1, (1938) 1 M L J. 1 L.R 65 I.A. 1 . I L. R. (1938) Bom. 239 (P.C.).

2. (1925) 49 M.L J 425 : I.L.R. 48 Mad. 836.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE HORWILL AND MR. JUSTICE KOMAN.

Venkataraya Goundan . *Appellant**

v.

Mallappa Goundan and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 48—Partition decree—Date of decree for purpose of computing limitation for execution—Test—Adjudication becoming ripe for execution

Where in a partition suit the respective rights of the parties are adjudicated upon and decided, the adjudication becomes ripe for execution on the date of judgment It is only the formalities to be observed in drafting the decree that remain thereafter to be carried out and the decree when drafted must bear the same date as the judgment Though the decree may be engrossed on stamp paper on a later date, the date of the decree for purposes of computing the period of limitation for execution has to be construed as the same date as that of the judgment.

Appeal against the order of the Court of the Subordinate Judge, Coimbatore, dated 4th April, 1944, in E. P. No. 362 of 1942, in O. S. No. 217 of 1923.

P. R Ramakrishna Aiyar, C K. Viswanatha Aiyar and *P. R. Vasudeva Aiyar* for Appellant.

P. N. Appuswami Aiyar and *M. Venkataramana Aiyar* for Respondents.

The Judgment of the Court was delivered by

Koman, J.—The appellant filed O. P. No. 14 of 1923 on 29th June, 1923, as pauper. The petition was subsequently registered as O S No. 217 of 1923. The appellant was only two years old at that time and was represented by his next friend Arunachala Goundan, the brother of the appellant's grandfather. The preliminary decree in the suit was passed on 7th October, 1924, in which the plaintiff was declared entitled to one-sixth share in the family properties and the final decree was passed on 23rd December, 1925. The plaintiff states that he became a major only in 1940, though this is disputed by the respondents. He filed E P. No. 362 of 1942, on 26th June, 1942, for execution of the final decree after getting the final decree engrossed with necessary stamps on 26th March, 1942 The learned Subordinate Judge of Coimbatore has dismissed the execution petition on the ground that it is barred under section 48 of the Code of Civil Procedure.

It is contended for the appellant that under section 48 (2) of the Civil Procedure Code he is within time. It is stated that because of fraud played by the judgment-debtors in selling some of the properties that should have come to his share under the final decree, he was prevented from executing the decree There is nothing in the present case to indicate that the appellant was really prevented from executing his decree. The mere fact that some of the judgment-debtors sold properties which should have fallen to the share of the appellant could not by itself prevent the appellant from proceeding in execution to recover his share of the properties under the partition

It is also contended on behalf of the appellant that for computing the period of limitation under section 48, in the present case the final decree should be deemed to have been dated only from the date when the decree was engrossed on the proper stamp paper and the decree was signed, *viz.*, from 26th March, 1942, and that if that is deemed to be the date of the final decree, this petition for execution is within time.

In *Ramachandra Rao* v *Parasuramayya*[1], a Full Bench of this Court had to interpret the meaning of "the date of the decree" in clause (*a*) of section 48 (1) of the

* A. A. O. No. 545 of 1944. 5th December, 1945.

1. (1940) 1 M.L.J. 235 : I.L.R. (1940) Mad. 349 (F.B).

Code of Civil Procedure and that Bench held that the date of the decree is the date when the decree becomes executable In that case the learned Judges were dealing with a mortgage decree, which was actually a composite decree, which, in their Lordships' opinion, was capable of being split up and ought to have been split up into a number of decrees, some of which were to come into effect only at a future date on the happening of certain contingencies.

The learned Judges in *Aiyasamier* v *Venkatachala Mudali*[1] distinguish the case they were dealing with and point out that a decree is defined as ·

> "the formal expression of an adjudication, which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit,"

and adds .

> "When the reliefs given in respect of those rights are distinct and enforceable at different periods of time, then for purposes of execution there is in fact more than one decree though embodied in one document In such cases it is only reasonable to hold that the date of the decree sought to be executed within the meaning of section 48 (*a*) of the Civil Procedure Code may not be what it bears on its face It is the date when the particular adjudication sought to be enforced becomes ripe for execution according to the terms of the decree"

These observations very clearly bring out the distinction between the facts in that case and the present case In the present case, unlike the above two cases the adjudication became ripe for execution on the date of judgment, in that the respective rights of the parties had been adjudicated and decided on It was only the formalities to be observed in drafting the decree that had to be yet carried out.

China Venkatappa v. *Peda Venkatappa*[2] is a decision of a Bench of this Court wherein a contention similar to that raised by the appellants in the present case was raised. That contention was rejected by the learned Judges as under Order 20, rule 7 of the Code of Civil Procedure the decree must bear the same date as the judgment In the present case also the date of the decree has to be construed as 23rd December, 1925, the date of the judgment

We are therefore of opinion that the date of the decree in the present case is 23rd December, 1925, and that, therefore, the petition for execution is clearly not within time The appeal is dismissed with costs

V S ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE RAJAMANNAR

Chinnathayi *alias* Veeralakshmi Ammal *Appellant**

v.

V. Kulasekharapandiya Naicker and another *Respondents*

Hindu Law—Impartible estate—Succession—Family arrangement—Construction—Release by next in line of succession according to lineal primogeniture in favour of widow of last male holder—Effect—Property given absolutely to the member renouncing his right to succession—Nature of

In 1862 the joint family to which the suit impartible estate (Bodinaickanoor Zamindari) belonged had five branches Succession to the estate had always been governed by the rule of lineal primogeniture, subject to a family custom according to which a younger son by a senior wife was preferred to an elder son by a junior wife By reason of such custom the estate devolved on *K* No I in 1862 on the death of his father representing the first branch On *K* No I's death on 15th December, 1888, the next in succession was his brother *V* who was however regarded as being mentally deficient and unfit for the *gadi* and passed over without protest *V* died in 1901 without male issue and the

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1 (1916) 31 M L J 513 I L R. 40 Mad. 989 (F B)

2 (1943) 2 M L J 112

* A. S Nos. 230, 300, 301, 302, 355, 356 and 413 of 1943 30th October, 1945.

line of succession of the first branch became extinct On *K* No I's death in 1888, as *V* had been passed over, the next in succession was *Kan* the eldest male of the second branch *K* No I was survived by his widow *Ku* who produced what purported to be a will of her husband under which he left the estate to her and gave her a power to adopt a son to him Though the will was found to be a forgery it served the purpose of inducing the members of the family to agree to a family arrangement under which the branches 2 to 5 were given certain villages and *pannai* lands absolutely for their maintenance and *Ku* was to remain in possession of a large part of the estate during her lifetime *Kan* subsequently filed a suit setting up his title to the *gadi* which *Ku* resisted as first defendant

On the 6th May, 1890, *Ku* arrived at a settlement with *S* the representative of the third branch, under which he was to have the village of *Do*, his share in the *pannai* lands set apart for the maintenance of the junior branches and receive Rs 3,000 in cash In consideration of this he surrendered to *Ku* by a deed of release whatever rights he had in the other properties of the estate Two days later *Ku* and *Kan* (of the second branch) entered into an agreement which was made a decree in *Kan's* suit The provisions of the compromise decree were

"*Clause* 1 —The first defendant shall enjoy during her lifetime the plaint mentioned Bodinaickanoor zamindari, with the incomes thereof and all its appurtenances, as also the buildings in her holding within the Bodinaickanoor Palace attached to the said zamin The first defendant shall have no right whatever to make any alienations of the said properties prejudicial to the plaintiff's interest

Clause 2 —Excluding the village of Dombucheri given up by the first defendant in favour of Sundara Pandia Naicker Avergal on the sixth instant, the said zamindari and the incomes thereof and all its appurtenances, together with the buildings within the said Palace as mentioned in paragraph 1 hereof and the rights, if any, acquired by the first defendant through the release deed entered into between the said Sundara Pandia Naicker Avergal and the first defendant, shall be enjoyed by the plaintiff Kandaswami Naicker and his heirs after the lifetime of the said first defendant

Clause 3 —The first defendant shall give up to the plaintiff the village of Boothipuram attached to the said zamin and the hamlets attached thereto, together with all the incomes thereof, so that he might enjoy them from 1st July, 1890, absolutely The first defendant alone shall pay to Government the full peishkush and road-cess of the said zamin including the said village and the plaintiff shall not be responsible for the said peishkush and road-cess

Clause 4 —The plaintiff and his heirs shall enjoy absolutely, free of thirva, with the power of alienation by way of gift, mortgage, sale, etc , one-fourth share in the nanja, punja and garden lands registered as *pannai* lands under the Bangaruswami tank and the Marimoor tank in the said zamin and specified in the schedules hereto annexed, as well as the lands which are now in the plaintiff's possession and for which patta stands in his name

Clause 5 —The first defendant shall pay to the plaintiff through Court in three months' time from this date Rs 35,000, thirty-five thousand, for the purpose of discharging the debt borrowed from V E N K V Ramanathan Chettiar at Madura through the zamindar of Thodappanaickanoor for the expenses, etc , of the aforesaid suit In default of payment of the said sum by the said date the plaintiff shall recover the same by a precept of the Court, with interest at one per cent per mensem

Clause 6.—Excluding the said zamindari and the buildings in the enjoyment of the first defendant within the Palace in Kasba Bodinaickanoor and the plaintiff's one-fourth share in the nanja, punja and garden lands registered as *pannai* lands under the Bangaruswami tank and the Marimoor tank attached to the said zamin, all other *pannai*, etc , lands and buildings and moveables, which belonged to or were in the enjoyment of the deceased Kamaraja Pandia Naicker Avergal and are situate either in the said zamindari or in other places, shall be held and enjoyed by the first defendant and her heirs with all rights and privileges and with the power of alienation by way of gift, mortgage, sale, etc , free from any subsequent claim by the plaintiff and his heirs

Clause 7 —All moveable and immoveable properties which may be acquired by the said first defendant during her lifetime either from the income of the said zamindari or from any other fund shall belong exclusively to the said first defendant with the right of alienation by way of gift, mortgage, sale, etc , and they shall after her death go to the first defendant's own heirs. Neither plaintiff nor his heirs shall have any right or claim over the said property

Clause 8 —The first defendant shall not do any act such as adoption, etc , contrary to the above arrangements and shall have no right whatever to do so "

As a result of the arrangement *Ku* got possession for her life of the estate (less the villages of *Bo* and *Do* and *pannai* lands set apart for the maintenance of branches 2 to 5) and absolutely some other *pannai* lands , *Kan* got the village of *Bo* and his share in the *pannai* lands set apart for maintenance and Rs 35,000, with the acknowledgment of his right to succeed to the zamindari on the death of *Ku* *S* got the village of *Do* and his share of the *pannai* lands for maintenance and a monetary payment of Rs 3,000 The fourth and fifth branches were content with their share of the *pannai* lands set apart for maintenance *Ku's* obligations under the deed of release and the compromise decree were eventually enforced

Ku died on 13th January, 1921 and *K* No II, the son of *Kan*, the eldest in line of succession in the second branch, went into possession of the estate as the nearest in succession and remained in possession until his death on 16th February, 1941 The widow of *K* No II claimed the estate as belonging absolutely to her husband and the representatives of the other branches claimed title to succeed to the estate On a construction of the release and compromise decree,

Held (i) The words "his heirs" in *clause* 2 of the compromise decree mean the heirs of *Kan* as the holder of the impartible estate according to the rule of lineal primogeniture and not the holder of it in his own absolute right The words do not mean the personal heirs of *Kan*

(ii) A member of a joint family owning an impartible estate can on behalf of himself and his heirs renounce his right of succession, but the surrender must be to all the branches of the family or to the head of the family as representing all its members

The deed of release by *S* is merely a surrender to *Ku* who was not the head of the family or entitled to succeed to the estate on the death of her husband *K* No. I All that she got under the release was a right to remain in possession of the estate for her lifetime and an absolute right to certain *pannai* lands Accordingly the deed of release did not operate to extinguish the right of the third branch to succeed to the estate, and the eldest lineal male descendant of the third branch was entitled to succeed to the estate.

(iii) The village of *Bo* given to *Kan* ceased to be part of the estate and became private property in his hands and descended to his son *K* No II On his death without male issue a widow's interest in it devolved upon his widow. The same considerations will apply to the village of *Do*

(iv) As regards the *pannai* lands *Ku* received an absolute estate in them under the family arrangement and they will descend to her heirs.

Appeal against the decree and the judgment of the Court of the District Judge of Madura in O. S. No. 6 of 1941, dated the 7th day of April, 1943.

Sir Tej Bahadur Sapru with *C. R Pattabhiraman, R Ramasubbu Aiyar, V. Ramaswami* and *N. Kotyswara Rao* for Appellants in Appeals Nos. 230 and 413, and for the 2nd Respondent in Appeals Nos 301 and 355 and for the 1st Respondent in Appeal No. 302 of 1943.

The Advocate-General (*K. Rajah Aiyar*), *R Ramasubbu Aiyar, C. R. Pattabhiraman, V Ramaswami* and *N. Kotyswara Rao*, for 1st and 2nd Respondents in Appeals Nos. 300 and 356 of 1943

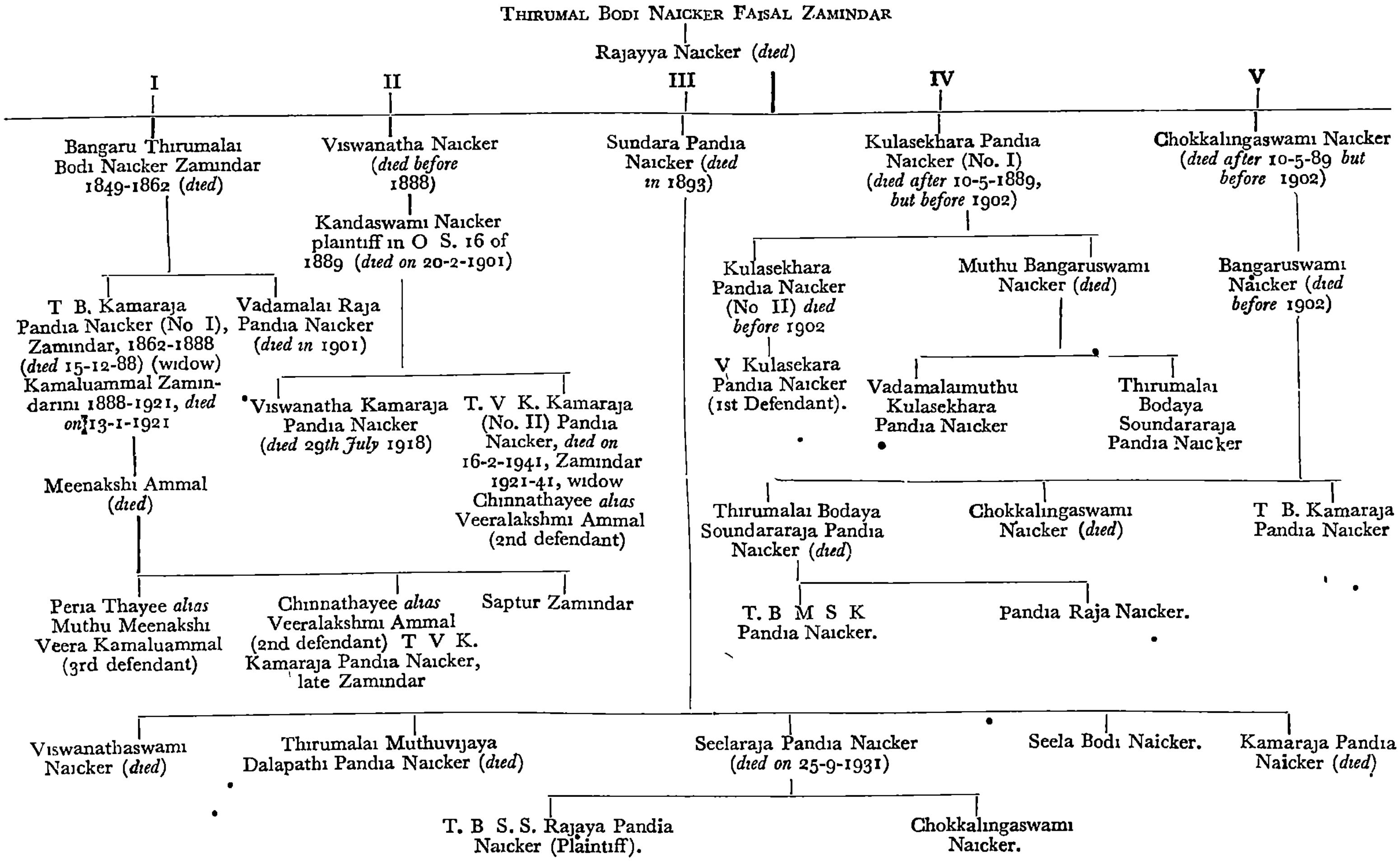
T R. Venkatarama Sastri, V Govindarajachari and *V V. Raghavan* for the 1st Respondent in Appeals Nos. 230, 355 and 413 and for the Appellant in Appeals Nos. 300, 301 and 302 and for the 3rd Respondent in Appeal No. 356 of 1943.

Sir Alladi Krishnaswami Aiyar with *A. Lakshminarayana Aiyar* (of the Madura Bar), *K. Subramaniam* and *Alladi Kuppuswami* for the 2nd Respondent in Appeals Nos. 230, 302 and 413 and for the Appellant in Appeals Nos 355 and 356 and for the 3rd Respondent in Appeal No. 300 and for the 1st Respondent in Appeal No. 301 of 1943.

The Judgment of the Court was delivered by

The Chief Justice.—Three of these seven appeals, namely, Nos. 413, 230 and 301 of 1943, raise questions with regard to the succession to the zamindari of Bodinaickanoor in the Madura District, which from ancient times has always been regarded as impartible and was declared so to be by the Madras Impartible Estates Act, 1904. Two of the appeals Nos 230 and 302 of 1943, call for a decision on the question whether the village of Boothipuram, which admittedly formed part of the estate before 8th May, 1890, became the private property of a member of the joint family Three of the appeals, Nos 302, 355 and 356 of 1943, relate to the present title to certain *pannai* (home-farm) lands and buildings thereon which had also belonged to the estate. There were four suits, which were tried together by the District Judge of Madura, who gave his findings in two judgments, one dated 22nd February, 1943, and the other dated 7th April, 1943 The appeals can conveniently be dealt with in one judgment as some of the facts are common to all of them.

The following pedigree will be helpful in appreciating the facts :


THIRUMAL BODI NAICKER FAISAL ZAMINDAR
Rajayya Naicker (died)
I
II
III
IV
V
Bangaru Thirumalai Bodi Naicker Zamindar 1849-1862 (died)
Viswanatha Naicker (died before 1888)
Sundara Pandia Naicker (died in 1893)
Kulasekhara Pandia Naicker (No. I) (died after 10-5-1889, but before 1902)
Chokkalingaswami Naicker (died after 10-5-89 but before 1902)
Kandaswami Naicker plaintiff in O S. 16 of 1889 (died on 20-2-1901)
T B. Kamaraja Pandia Naicker (No I), Zamindar, 1862-1888 (died 15-12-88) (widow) Kamaluammal Zamindarini 1888-1921, died on 13-1-1921
Vadamalai Raja Pandia Naicker (died in 1901)
Viswanatha Kamaraja Pandia Naicker (died 29th July 1918)
T. V K. Kamaraja (No. II) Pandia Naicker, died on 16-2-1941, Zamindar 1921-41, widow Chinnathayee alias Veeralakshmi Ammal (2nd defendant)
Meenakshi Ammal (died)
Peria Thayee alias Muthu Meenakshi Veera Kamaluammal (3rd defendant)
Chinnathayee alias Veeralakshmi Ammal (2nd defendant) T V K. Kamaraja Pandia Naicker, late Zamindar
Saptur Zamindar
Kulasekhara Pandia Naicker (No II) died before 1902
V Kulasekara Pandia Naicker (1st Defendant).
Muthu Bangaruswami Naicker (died)
Vadamalaimuthu Kulasekhara Pandia Naicker
Thirumalai Bodaya Soundararaja Pandia Naicker
Bangaruswami Naicker (died before 1902)
Thirumalai Bodaya Soundararaja Pandia Naicker (died)
Chokkalingaswami Naicker (died)
T B. Kamaraja Pandia Naicker
T. B M S K Pandia Naicker.
Pandia Raja Naicker.
Viswanathaswami Naicker (died)
Thirumalai Muthuvijaya Dalapathi Pandia Naicker (died)
Seelaraja Pandia Naicker (died on 25-9-1931)
Seela Bodi Naicker.
Kamaraja Pandia Naicker (died)
T. B S. S. Rajaya Pandia Naicker (Plaintiff).
Chokkalingaswami Naicker.

It will be noticed that some of the persons named in the pedigree are described as parties These descriptions are taken from O S No 6 of 1941, which has been regarded as the main suit We shall as far as possible adhere to these descriptions in the judgment

In 1862, when the narrative opens the joint family to which this impartible estate belonged had five branches Succession to the estate had always been governed by the rule of lineal primogeniture, subject to a family custom according to which a younger son by a senior wife was preferred to an elder son by a junior wife The learned District Judge found this custom to be proved and the judgment in this respect has been accepted by all parties By reason of the custom the estate devolved on T B Kamaraja Pandia Naicker (hereinafter referred to as Kamaraja No. I), the son by the senior wife, on the death of his father the representative of the first branch Kamaraja No I died on the 15th December, 1888 The next in succession was his brother Vadamalai, who was a son by the junior wife Vadamalai was regarded as being mentally deficient, although in O S No 31 of 1902, to which further references will be made later, it was held that he was not debarred from succession by reason of mental affliction The representatives of all the five branches regarded him as being debarred from succession for this reason and he was passed over without any protest. In the present litigation all the parties have regarded him as being unfitted for the *gadi* and the appeals have proceeded on this basis He died in 1901 without male issue There were no other male descendants of the first branch and consequently that line of succession became extinct

As Vadamalai had been passed over, on the death of Kamaraja No. I, the next in succession was Kandaswami Naicker, the eldest male of the second branch. Kamaraja No I was survived by his widow Kamaluammal She was a young woman, but of very forcible character On her husband's death, she produced what purported to be a will of her husband under which he left the estate to her and gave her a power to adopt a son to him In O S No 31 of 1932, to which all the members of the joint family were parties, the will was held to be a forgery, but it served the purpose of inducing the members of the family to agree to a family arrangement under which she was to remain in possession of a large part of the estate during her lifetime The judgment of the Privy Council in *Sartaj Kuari's case*[1] was delivered on the 21st January, 1888 It was there held that the holder of an impartible estate had a right of absolute alienation, unless there was a custom to the contrary or by the nature of the tenure It was not until the *First Pittapur case*[2], that the Judicial Committee actually held that the holder of an impartible estate had a power of leaving it by will, but that was the logical deduction from the judgment in *Sartaj Kuari's case*[1]. Sir Tej Bahadur Sapru, on behalf of the second defendant, has suggested that it was the judgment in *Sartaj Kuari's case*[1], which induced the male members of the family to enter into the agreement with the widow and this suggestion has not been repudiated by any of the learned counsel appearing in these appeals In our opinion this is the only possible explanation for the course which those in order of succession decided to take after the death of Kamaraja No I It has been shown that they were being advised by eminent counsel of the Madras Bar, who must have appreciated the significance of the judgment in *Sartaj Kuari's case*[1].

On the 18th December, 1888, Kandaswami, the representative of the second branch and the person entitled to succeed to Kamaraja No I after Vadamalai, who by common assent was mentally unfitted and in fact preferred no claim to the *gadi*, made a statement to the Deputy Collector on general duty in the Madura District in which he stated that he had no objection to Kamaluammal succeeding to the zamindari and that she was competent to administer it He also stated that Vadamalai was of unsound mind and that he was not aware of the execution of any will by Kamaraja No I. On the same day similar statements were made

1 (1888) L. R. 15 I.A 51 : I L R 10 All. 272 (P C)

2 (1899) 9 M L J (Supp) 1 . L R. 26 I.A 83 I L R 22 Mad 383 (P C.)

to the Deputy Collector by Sundara Pandiya (the representative of the third branch), Kulasekara No I, (the representative of the fourth branch), Chokkalingaswami (the representative of the fifth branch), and Bangaruswami (also a member of the fifth branch). The statement of these persons that they did not know of the will is certainly open to question. On the 19th December, 1888, Kamaluammal herself made a statement to the Deputy Collector in which she referred to the will. In fact she placed the Deputy Collector in possession of the document, and intimated that she intended to adopt a son whenever she thought fit to do so

On the 19th December, 1888, Kandaswami, Sundara Pandiya, Kulasekhara No I and Chokkalingaswami made a joint statement to the Deputy Collector in which they committed themselves to these statements ·

"Thirumalai Bodia Kamaraja Pandia Naicker Avergal, who was the zamindar of Bodinaickanoor aforesaid, died of rheumatism from which he was suffering on the morning of the 15th instant We, four persons, are his heirs to succeed and yet we agree to his widow Kamaluammal's succeeding to and enjoying the abovesaid zamin and all other properties save the undermentioned lands set apart for our maintenance Remission of the tirwah of the said lands allowed to us and of the tirwah of the lands registered in our names and enjoyed till now should be granted to us"

In this statement they gave a description of the lands which had been allotted to them for their maintenance They are *pannai* lands adjoining two tanks, named Bangaruswami tank and Marimoor tank respectively The total area measured about 350 acres. These *pannai* lands are not the *pannai* lands the ownership of which is now in dispute in these appeals It is admitted that the lands referred to in this joint statement were by common consent of all the members of the family given absolutely to the four persons mentioned for their maintenance and the maintenance of their heirs and that they no longer form part of the zamindari

On the 5th January, 1889, the Deputy Collector made a report to the Collector on the statements made to him by the members of the family and forwarded to him the will set up by Kamaluammal He expressed the opinion that the will was genuine and that the widow was capable of managing the estate On the 9th January, 1889, the Collector himself recorded statements made by the representatives of the third, fourth and fifth branches of the family They were all in keeping with the statements which they had made to the Deputy Collector. Kandaswami, the representative of the second branch, was not examined by the Collector until 14th January, 1889, and in his statement on that occasion he repudiated what he had said to the Deputy Collector. He stated that he had made and signed his first statement when he was ill and "drowned with sorrow" and that he did not know whether it was read to him or not He also repudiated his signature on the joint statement made to the Deputy Collector on the 19th December, 1888 He alleged that his signature to that statement was a forgery It is obvious that he was then repenting of his decision to forego his right to immediate possession of the zamindari as the nearest male heir to Kamaraja No. I. On the 1st May, 1889, he filed O S No. 16 of 1889 in the Court of the Subordinate Judge of Madura (West). The defendants to the suit were Kamaluammal and the Collector. He averred that according to the Hindu law, custom and the law of primogeniture he was entitled to succeed to the zamindari and to all its appurtenances. He asked for a declaration to that effect and a decree giving him possession of the properties. In her written statement Kamaluammal besides setting up the forged will averred that her deceased husband was separate in food, residence, interest and estate from the plaintiff and his uncles, that they had no coparcenary or joint right in the zamindari and that he was the sole proprietor of it with absolute power of disposition over it. On this basis she claimed to be entitled to the estate, although she was willing to abide by the agreement embodied in the joint statement of the representatives of the four branches to the revenue authorities on the 19th December, 1888. Her pleas that the family had become divided and that her husband was entitled to the estate in his own right were certainly false.

On the 6th May, 1890, Kamaluammal arrived at a settlement with Sundara Pandiya, the representative of the third branch, under which he was to have the village of Dombucheri, his share in the *pannai* lands set aside for the maintenance

of the second, third, fourth and fifth branches and to receive from her Rs. 3,000 in cash. In consideration of this he surrendered to her whatever rights he had in the other properties of the estate. The deed, which has throughout been referred to as "the deed of release" to which description we shall adhere, contains these provisions :

"(3) . . Whatever rights over the said zamin properties and in all the other above-mentioned properties the said Sundara Pandia Naicker Avergal might possess, he gives up such rights absolutely in favour of the said Kamaluammal Avergal and her heir enabling them to enjoy them with power of alienation thereof by way of gift, sale, etc (4) And whatever rights the said Kamaluammal might possess over the Dombucheri village and over the lands lying under the irrigation of the Bangaruswami tank and the Marimoor tank and specified in the third column of the schedule hereto, which are given up to the aforesaid Sundara Pandia Naicker Avergal, the said Kamuluammal Avergal hereby gives up such rights absolutely in favour of the said Pandia Naicker Avergal and his heirs, enabling them to enjoy them with the power of alienation thereof by way of gift, sale, etc (5) The said Kamaluammal and her heirs shall have no claim at all to the properties shown as belonging to Sundara Pandia Naicker Avergal as aforesaid and the said Sundara Pandia Naicker Avergal and his heirs shall have no claim at all to the properties shown as belonging to the said Kamaluammal Avergal"

On 8th May, 1890, two days later, Kamaluammal and Kandaswami entered into an agreement of compromise and this agreement was made a decree in O. S. No. 16 of 1889 It is hereinafter referred to as "the compromise decree." Clauses 1 to 8 are of great importance and we will quote them *in extenso*.

"*Clause* 1 —The first defendant shall enjoy during her lifetime the plaint mentioned Bodinaickanoor zamindari, with the incomes thereof and all its appurtenances, as also the buildings in her holding within the Bodinaickanoor Palace attached to the said zamin The first defendant shall have no right whatever to make any alienations of the said properties prejudicial to the plaintiff's interest

Clause 2 —Excluding the village of Dombucheri given up by the first defendant in favour of Sundara Pandia Naicker Avergal on the sixth instant, the said zamindari and the incomes thereof and all its appurtenances, together with the buildings within the said Palace as mentioned in paragraph 1 hereof and the rights, if any, acquired by the first defendant through the release deed entered into between the said Sundara Pandia Naicker Avergal and the first defendant, shall be enjoyed by the plaintiff Kandaswami Naicker and his heirs after the lifetime of the said first defendant

Clause 3 —The first defendant shall give up to the plaintiff the village of Boothipuram attached to the said zamin and the hamlets attached thereto, together with all the incomes thereof, so that he might enjoy them from 1st July, 1890, absolutely The first defendant alone shall pay to Government the full peishkush and road-cess of the said zamin including the said village and the plaintiff shall not be responsible for the said peishkush and road-cess

Clause 4 —The plaintiff and his heirs shall enjoy absolutely, free of thirva, with the power of alienation by way of gift, mortgage, sale, etc, one-fourth share in the nanja, punja and garden lands registered as *pannai* lands under the Bangaruswami tank and the Marimoor tank in the said zamin and specified in the schedules hereto annexed, as well as the lands which are now in the plaintiff's possession and for which patta stands in his name

Clause 5 —The first defendant shall pay to the plaintiff through Court in three months' time from this date Rs. 35,000, thirty-five thousand, for the purpose of discharging the debt borrowed from V E N. K V Ramanathan Chettiar at Madura through the zamindar of Thodappanaickanoor for the expenses, etc, of the aforesaid suit. In default of payment of the said sum by the said date the plaintiff shall recover the same by a precept of the Court, with interest at one per cent. per mensem

Clause 6 —Excluding the said zamindari and the buildings in the enjoyment of the first defendant within the Palace in Kasba Bodinaickanoor and the plaintiff's one-fourth share in the nanja, punja and garden lands registered as *pannai* lands under the Bangaruswami tank and the Marimoor tank attached to the said zamin, all other *pannai*, etc, lands and buildings and moveables, which belonged to or were in the enjoyment of the deceased Kamaraja Pandia Naicker Avergal and are situate either in the said zamindari or in other places, shall be held and enjoyed by the first defendant and her heirs with all rights and privileges and with the power of alienation by way of gift, mortgage, sale, etc., free from any subsequent claim by the plaintiff and his heirs

Clause 7 —All moveable and immoveable properties which may be acquired by the said first defendant during her lifetime either from the income of the said zamindari or from any other fund shall belong exclusively to the said first defendant with the right of alienation by way of gift, mortgage, sale, etc, and they shall after her death go to the first defendant's own heirs Neither plaintiff nor his heirs shall have any right or claim over the said property

Clause 8 —The first defendant shall not do any act such as adoption, etc, contrary to the above arrangements and shall have no right whatever to do so."

It is common ground that all the members of the family were aware of the provisions of the deed of release and those of the compromise decree and that they embodied a family arrangement binding on all of them. One of the issues in the

trial Court was whether the deed of release and the compromise decree should be read together The District Judge held that they should, and this decision has been accepted by all the parties in this Court. It is also admitted that the allotment of *pannai* lands for the maintenance of the respective branches embodied in the joint statement to the Deputy Collector of the 19th December, 1888, was also part of the family arrangement As most of the questions that call for decision turn on the construction of the deed of release and the compromise decree, we shall in due course examine their provisions in detail For the moment it is sufficient to state that as the result of this arrangement Kamaluammal got possession for her life of the estate (less the villages of Boothipuram and Dombucheri and the *pannai* lands set apart for the maintenance of the second, third, fourth and fifth branches of the family) and absolutely the *pannai* lands referred to in clause 6 of the compromise decree. Kandaswami got the village of Boothipuram and his share in the *pannai* lands set apart for maintenance and Rs 35,000 with the acknowledgment of his right to succeed to the zamindari on the death of Kamaluammal. Sundara Pandia got the village of Dombucheri and his share of the *pannai* lands set aside for maintenance and a monetary payment of Rs. 3,000. The fourth and fifth branches were content with their respective shares of the *pannai* lands set aside for maintenance As succession to the estate was governed by the rule of lineal primogeniture the fourth and fifth branches could not hope for succession until the second and third branches had become extinct and the fifth branch would have no right until the fourth branch had become extinct. The fact that the fourth and fifth branches were so far from succession no doubt induced the representatives of those branches to be content with the arrangement made for their maintenance

Sundara Pandia did not get possession of Dombucheri until he filed a suit (O. S No 33 of 1890) against Kamaluammal He obtained a decree against her on the 9th February, 1891 Sundara Pandia died in 1893 and his four sons wished to have the village of Dombucheri separately registered In this they were opposed by Kamaluammal and they filed O. S No 8 of 1894 for a declaration that they were so entitled This suit was brought on the basis of the family arrangement. They obtained a decree on the 24th December, 1894, declaring their right to have the village separately registered Kamaluammal also opposed the registration of the village of Boothipuram in Kandaswami's name This resulted in Kandaswami instituting O. S No. 203 of 1899 to enforce his right in this respect. There were other suits brought by the second and third branches against Kamaluammal with regard to the recovery from her of the peishkush which they had been forced to pay to Government and which she should have paid under the terms of the family arrangement, but it is not necessary to refer to these suits in detail. It is sufficient to say that Kamaluammal's obligations under the deed of release and the compromise decree were eventually enforced.

On the 25th April, 1902 Viswanathaswami, an illegitimate son of Kamaraja No. 1 filed O. S No 31 of 1902 against Kamaluammal and the members of the second, third, fourth and fifth branches claiming to be entitled to the zamindari. He averred that he was legitimate, but he included in his plaint an alternative claim for maintenance should it be held that he was illegitimate. His suit failed entirely, but it is of importance because Kamaluammal set up by way of defence the will which she had produced to the revenue authorities and it was held to be a forgery It was in this suit that it was also held that Vadamalai was not debarred from succeeding to the estate by reason of insanity. This finding would have been of importance if Vadamalai had survived and had claimed the estate or if he had male issue who did, but as he preferred no claim and left no issue it is not relevant to the issues which now fall for decision

Kamaluammal died on 13th January, 1921. As Kandaswami had died on the 20th February, 1901 and as his first son Viswanatha had died in 1918 his second son Kamaraja No. II went into possession of the estate as the nearest in succession and remained in possession until his death on the 16th February, 1941 His death gave rise to the present litigation.

Very soon after the death of Kamaraja No II, the second defendant (his widow) and the third defendant (his sister-in-law) filed O S No 44 of 1941 in the Court of the Subordinate Judge of Madura for the cancellation of a deed of release dated the 9th June, 1934, which they had executed in favour of Kamaraja No. II, on the ground that they had signed it as a result of fraud and misrepresentation on his part This suit was transferred to the Court of the District Judge on the 4th July, 1941, and was there numbered O S. No. 2 of 1941 The decree passed therein has given rise to Appeals Nos 300 and 356 of 1943.

On the 25th June, 1941, the second defendant filed O S No 18 of 1941 in the Court of the Subordinate Judge of Dindigul against the first defendant (the representative of the fourth branch), the plaintiff (the representative of the third branch), Seelabodi (the fourth son of Sundara Pandia) and T B. M S K Pandia and T B Kamaraja Pandia (the representatives of the fifth branch) This suit was transferred to the District Court and numbered O S No 5 of 1941 The second defendant, as plaintiff in this suit, claimed that she was entitled to the zamindari and its appurtenances on the death of her husband on the ground that he held the estate as his own absolute property Out of this suit arises Appeal No. 413 of 1943

On the 27th August, 1941, the plaintiff filed in the Court of the Subordinate Judge of Dindigul, O S No 30 of 1941 against the first, second and third defendants He claimed to succeed to the zamindari, including the village of Boothipuram This suit was transferred to the District Court and there numbered O S No 6 of 1941 The appeals arising out of it are Nos 230, 301 and 355 of 1943

In his written statement in O S Nos 5 and 6 of 1941 Kulasekhara claimed to be entitled to succeed to the estate, including the village of Boothipuram, on the ground that under the family arrangement the third branch had left the family and therefore the plaintiff in O S No 6 of 1941 was not entitled to succeed to the estate and that it devolved on him as the next in succession after the death of Kamaraja No II In O S No. 35 of 1941 of the Subordinate Court of Dindigul, Kulasekhara No II claimed a declaration of his title to Boothipuram On transfer to the District Court this suit was numbered O S No 7 of 1941. Appeal No. 302 of 1943 is the result of the decree in this suit.

We have already mentioned two findings of the learned District Judge, namely, that there was a family custom by which a son of the senior wife, although junior in age, succeeded in preference to an elder son by a junior wife and that the deed of release and the compromise decree embodied a family arrangement and should be read together His further findings may be summarised as follows .

1 The family had continued throughout to be joint The family arrangement entered into on the death of Kamaraja No I did not affect the impartibility of the estate or involve a separation of the family The succession continued to be governed by the rule of lineal primogeniture

2. The family arrangement merely gave Kamaluammal a right to possession of the estate during her lifetime and on her death it devolved on Kamaraja No II in accordance with the rule of succession.

3 The deed of release did not exclude the right of the third branch to succeed and the plaintiff became entitled to the estate on the death of Kamaraja No II.

4. The village of Boothipuram had not ceased to be part of the zamindari and devolved on the plaintiff with the rest of the estate on the death of Kamaraja No. II.

5. The *pannai* lands referred to in clause 6 of the compromise decree became the absolute property of Kamaluammal and had now devolved on her grand-daughters, the second and third defendants.

6. The claim of the second and third defendants for cancellation of the deed of release and compromise dated 9th June, 1934, executed by them in favour of Kamaraja No. II was well founded and therefore they were entitled to the properties mentioned therein.

We will first deal with Appeals Nos 413, 230 and 301 of 1943 in which the question of the right of succession to the zamindari arises. The appellant in Appeals Nos 413 and 230 is the second defendant and the appellant in Appeal No 301 is the first defendant. Sir Tej Bahadur Sapru addressed the Court first on behalf of the second defendant He contended that the deed of release and the compromise decree had the effect of separating the family and giving the zamindari to Kandaswami as his personal property after the death of Kamaluammal, to whom he had granted a life estate As we understood him, Sir Tej did not dispute the proposition that the estate was still impartible, but instead of being owned by the five branches of the family it was according to him owned by Kandaswami's branch alone He said that the word "heirs" in the compromise decree must be given the same meaning throughout, unless it was evident from the context that a different meaning should be put upon it The correctness of this statement is not open to question, but Mr. T R Venkatarama Sastri on behalf of the first defendant contended, as did Sir Alladi Krishnaswami Ayyar on behalf of the plaintiff, that in deciding what was implied by the word "heirs" regard must be had to the kind of property being dealt with in the particular clause. The nature of the property determined the meaning to be given to the word "heirs" in each particular case

We consider that the argument advanced on behalf of the contesting respondents must be accepted In delivering the judgment of the Privy Council in the *Sivaganga case*,[1] Turner, L J, said:

"The law of succession follows the nature of the property and of the interest in it"

The successor to the zamindari may not be the heir to the personal estate of a member of the joint family If a member of the joint family dies leaving personal estate his heirs will be his own male descendants, if he has male descendants. Clause 2 of the compromise decree provides for succession to the zamindari Clause 4 relates to the share of Kandaswami in the *pannai* lands set aside for the maintenance of the second, third, fourth and fifth branches Clause 6 relates to the *pannai* lands which were to devolve upon Kamaluammal As it is admitted that the various branches took absolutely their shares of the *pannai* lands set aside for maintenance the words "his heirs" in clause 4 can only mean the heirs to Kandaswami's personal estate Similarly the words "her heirs" in clause 6 can only mean the personal heirs of Kamaluammal, because, the clause makes it quite clear, that she was to have the *pannai* lands covered by it as her personal property.

Clause 2 provides that the zamindari, excluding the village of Dombucheri, should be enjoyed by Kandaswami and "his heirs" after the lifetime of Kamaluammal Unless the family arrangement had the effect of vesting in Kandaswami on the death of Kamaluammal the zamindari as his own absolute property, the words "his heirs" here must mean the heirs to the zamindari according to the rule of lineal primogeniture which had previously governed the family In our judgment the documents cannot be read as changing the character of the estate from that of an impartible estate belonging to the joint family to an estate owned by Kandaswami in his individual right The only change effected by the settlement so far as the estate was concerned was to defer the right of Kandaswami to its possession as the next in succession until after the death of Kamaluammal Notwithstanding the decision in *Sartaj Kuari's case*[2], Kandaswami could not himself make it his own private property, that is conceded by all All he could do was to alienate it. The alienation which he agreed to was merely for the lifetime of Kamaluammal. On her death it was to return to him as the person entitled to it under the rules of lineal primogeniture We shall in due course discuss the first defendant's contention that the third branch went out of the family by reason of the deed of release. Whether the third branch went out or remained in, the rest of the family remained joint and the estate remained with the family as impartible property It follows

1. (1863) 9 M I.A 539 at 610 2 (1888) L R 15 I A 51 : I L.R 10 All 272 (P C).

that we accept the finding of the District Judge that the words "his heirs" in clause 2 of the compromise decree mean the heirs of Kandaswami as the holder of the impartible estate and not the holder of it in his own absolute right.

Where a document is couched in language which leaves no room for doubt with regard to its meaning, the Court cannot have regard to the subsequent conduct of the parties in interpreting it; but if there is any ambiguity, the Court can have regard to the manner in which the parties themselves have read it It certainly cannot be said that the words "his heirs" in clause 2 of the compromise decree clearly mean the personal heirs of Kandaswami Therefore if there is room for doubt that they mean his heirs according to the rule of lineal primogeniture in a family owning an impartible estate, the meaning which we have assigned to them, we can have regard to what has transpired since and as these appeals may go further we will proceed to show how Kandaswami's son, Kamaraja No II, and the second defendant have read clause 2. In O.S No. 19 of 1921 the fifth branch attacked the deed of release and the compromise decree, but did not proceed to trial The members of the other branches were made parties and Kamaraja No. II filed a written statement in which he made *inter alia* the following averments :

(1) The parties to the suit were governed by the general custom regulating the succession to impartible estates in South India and by the rules of the Mitakshara School of Hindu Law applicable to a joint Hindu family holding an ancestral impartible estate.

(2) On the death of Kamaraja No I on the 15th December, 1888, the impartible zamindari devolved on the nearest coparcener of the senior line, namely, Kandaswami

(3) On the death of Kandaswami the estate devolved by survivorship on Viswanatha Kamaraja, the elder son, and upon his death in 1918 without male issue it devolved upon himself

(4) In order to avoid protracted litigation and expense and purchase peace his father entered into a compromise with Kamaluammal, whereby he gave her a right to enjoy the estate during her lifetime, but only on the condition that the zamindari and its income should be enjoyed by Kandaswami and his heirs after the lifetime of Kamaluammal

(5) Kandaswami had not become divided in status

(6) The plaintiff as the descendant of the juniormost branch was in no view of the law entitled to the zamindari and was postponed to himself who was the representative of the second branch and to defendants 1 to 7, who were the representatives of the third branch and to defendants 9 to 11, who were the representatives of the fourth branch

Kamaraja No II adopted the same attitude in his written statement in O.S. No. 7 of 1925 which was filed by the zamindar of Saptur, the brother of the second and third defendants, in an attempt to gain possession of the *pannai* lands which had devolved upon Kamaluammal under clause 6 of the compromise decree. In O.S. No. 9 of 1933 Kamaraja No. II and the second and third defendants sued the zamindar of Saptur to recover a bungalow in Madura on the ground that it belonged to the zamindari. The plaintiffs there all adopted this attitude, but the second and third defendants preferred an alternative plea, namely if the property did not belong to the zamindari, it belonged to them as the *stridhanam* heirs of Kamaluammal The alternative plea succeeded.

The second defendant is claiming the zamindari as the heir of her husband and she can have no greater rights than he had. He regarded the estate as still belonging to the family and the second defendant adopted the same attitude in Original Suit No 9 of 1933. In these circumstances it is surprising that the second defendant should turn round and repudiate her husband's pleadings and her own in the suits to which we have referred We hold that the second defendant has no title to the zamindari.

The next question which falls for decision is whether by virtue of the family arrangement it can be said that the third branch left the family and gave up all right to succeed to the zamindari Mr. T. R Venkatarama Sastri, on behalf of the first defendant, says that the deed of release in itself operates as a surrender by Sundara Pandia, the representative of the third branch, on behalf of himself and his heirs, of all right of succession. He says further that if in itself it has not this effect, it has the effect when read with the compromise decree

There can be no doubt that a member of a joint family owning an impartible estate can on behalf of himself and his heirs renounce his right of succession. If

authority is needed it is to be found in the decisions of the Privy Council in *Sivaganga Thevan* v *Periaswami*[1] and *Shibprasad Singh* v. *Prayagkumari Debee*[2] In *Subbanna* v. *Balasubba Reddi*,[3] a Full Bench of this Court held that a member of a joint Hindu family governed by the Mitakshara law cannot give his interest in the family estate to one of several coparceners if they remain joint in estate ; in such circumstances he can relinquish his interest, but the relinquishment must operate for the benefit of all the other members The same principle must apply to a joint family owning an impartible estate. The surrender must be to all the branches of the family or to the head of the family as representing all its members

The deed of release is merely a surrender to Kamaluammal, who was not the head of the family or entitled to succeed to the estate on the death of her husband Kamaraja No. I By the deed of release he gave up all rights that he might possess in the estate to Kamaluammal and the concluding portion of the document provides that neither he nor his heirs should have any claim to properties shown as belonging to Kamaluammal All that she got under the family settlement was a right to remain in possession of the estate for her lifetime and an absolute right to certain *pannai* lands. The deed of release was not an agreement with a person who was entitled to succeed to the estate by the rule of lineal primogeniture. The reason why Kamaluammal entered into this agreement with Sundara Pandia was because he had preferred a claim to succession by reason of the fact that he was then the eldest male member of the joint family. We consider that the document cannot be read as an intention to surrender his right of succession, and what is also of importance the agreement was not with the head of the family. In these circumstances we hold that the deed of release did not operate to extinguish the right of the third branch to succeed to the estate.

Now, has it this effect when read with the compromise decree ? Mr T. R. Venkatarama Sastri says that it has this effect by reason of clause 2 of the compromise decree. He relies on the words " and the rights, if any, acquired by the first defendant through the release deed entered into between the said Sundara Pandiya Naicker Avergal and the first defendant " The clause must be read as a whole and, as we have shown, its effect is that excluding the village of Dombucheri and the rights, " if any " acquired by Kamaluammal under the release deed, the estate should devolve upon Kandaswami and his heirs after the lifetime of Kamaluammal. The words "if any " are of importance All that Kamaluammal really got from Sundara Pandia was an undertaking from him not to interfere with her enjoyment of the estate during her lifetime.

The right to succeed to an impartible zamindari, especially a zamindari of the importance of Bodinaickanur, is a very valuable right and before the Court can hold that that right has been surrendered it must have clear proof of this. When we take into consideration the circumstances under which the deed of release and the compromise were entered into, the absence of any indication in these documents that Sundara Pandia intended to leave the family and the subsequent conduct of important members of the family we cannot hold that he surrendered his right of succession, even reading the two documents together Moreover, the pleadings of Kamaraja No II in Original Suit No. 19 of 1921, Original Suit No. 7 of 1925 and Original Suit No. 9 of 1933, actually recognised a right of succession still being in the third branch This means that the person who was the rightful owner of the estate according to the rule of lineal primogeniture recognised the right of the third branch to be in the family, notwithstanding that its representative had been given the village of Dombucheri The question of succession under discussion cannot, of course, be decided by the attitude of the second branch. It must be decided on the wording of the deed of release and the compromise decree. We have said sufficient to indicate that we are firmly of the opinion that these documents have not the effect which the fourth branch now contends they have. Accord-

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1. (1878) L.R. 5 I A 61 I.L.R. 1 Mad 312 (P.C)
2. (1931) 63 M.L J. 196 L.R. 59 I A. 331 : I.L.R 59 Cal 1399 (P.C).
3. (1945) 1 M.L.J. 140 I.L R (1945) Mad. 610 (F.B.).

ingly we hold that the District Judge was right in deciding that the plaintiff was the rightful successor to the estate

We do not agree, however, with the District Judge that the village of Boothipuram remained part of the estate and that it devolved upon the plaintiff as such. The question of the title to Boothipuram depends entirely on the construction to be placed on clause 3 of the compromise decree The wording is free from all ambiguity It provides that Kamaluammal should give up the village to Kandaswami and that he should enjoy the property with all income *absolutely* Of course if this provision were not a part of a family settlement, Kandaswami would get no title to it, because Kamaluammal was not the successor to the estate; but as all the branches agreed to Kandaswami having this village as his private property, it was with common assent taken out of the zamindari and given to him. It became private property in his hands and it descended to his son Kamaraja No II as such As Kamaraja No II died without male issue a widow's interest in it devolved upon the second defendant

Very little has been said in the course of the appeal about the village of Dombucheri, but the same considerations apply here Under the deed of release this village went to Sundara Pandia who was to enjoy it "hereditarily with all rights and with power of alienation by way of gift, sale, etc" As this was also part of the family arrangement, all parties are bound The plaintiff has throughout so regarded it as his personal property and the first and second defendants have accepted this position The first defendant must necessarily accept it, because he claims the estate on the basis that Sundara Pandia surrendered his rights of succession on behalf of himself and his heirs in consideration of receiving Dombucheri, his quarter share in the *pannai* lands set aside for maintenance and the payment of Rs. 3,000 The second defendant is also forced to take up the position because she claims that the family arrangement involved the disruption of the family and the conversion of the impartible estate into the private property of the second branch.

There remains to be considered the title to the *pannai* lands which devolved upon Kamaluammal under clause 6 of the compromise agreement The appeals which relate to these lands are Appeals Nos 300, 355 and 356 of 1943 The appellant in Appeal No 300 of 1943 is the first defendant The appellant in Appeals Nos. 355 and 356 of 1943 is the plaintiff In this Court all parties have accepted clause 6 of the compromise decree as having conferred an absolute estate in these *pannai* lands on Kamaluammal and therefore it is unnecessary to discuss the actual wording of the clause. We may, however, add that had we been called upon to decide the effect of the clause, we should have held that Kamaluammal received an absolute estate in these lands

There can be no doubt that when Kamaraja No. II succeeded to the estate, he cast covetous eyes on these lands, which were in the possession of his wife and her sister (the second and third defendants), as did their brother the zamindar of Saptur. It was on the 10th December, 1924, that the Zamindar of Saptur filed O. S. No. 7 of 1925 claiming title to these lands as Kamaluammal's daughter's son This suit failed and it was held that Kamaluammal acquired an absolute title to the lands and that on her death the second and third defendants as her *stridhanam* heirs were entitled to them in preference to their brother It will also be recalled that their title to the *zamin* bungalow at Madura was questioned in Original Suit No 9 of 1933 which Kamaraja No II and his wife and her sister filed against the zamindar of Saptur where the decision was also against him In 1934 Kamaraja No. II endeavoured to induce the second and third defendants to release these *pannai* lands to him absolutely in consideration of the payment to each of them of Rs 250 per mensem for their maintenance during their respective lives The proposed consideration was altogether inadequate It is admitted that the income of these lands was then at least Rs 35,000 per annum. The ladies favoured Kamaraja No II in preference to the zamindar of Saptur and were agreeable to Kamaraja No II having the lands for his lifetime on his paying to them maintenance at the rates suggested, but they were not prepared to let him have anything more than a life

interest In the event of his predeceasing them they wished to regain possession of the properties

The second and third defendants are *purdanashin* ladies, but they read and speak English Admittedly they never received independent advice Kamaraja No II had consulted the late Mr S Srinivasa Ayyangar, then a prominent leader of the Madras Bar, who advised him Mr V Ramaswami Aiyer also, of the Madras Bar, acted as junior counsel Neither Mr Srinivasa Ayyangar nor Mr V Ramaswami Aiyar ever came in contact with the second and third defendants Mr. V Ramaswami Aiyar gave evidence and it is quite clear from his testimony that the ladies were adamant in refusing to let Kamaraja No II to have more than a life interest in the lands In the course of his evidence he stated that Kamaraja No II had told him that the ladies would not agree to the draft which had been prepared giving him an absolute interest and that the document should make it perfectly clear that the arrangement and the benefit of the release should be for him only and that the ladies should have the properties if he should die earlier Written instructions were given to the Madras advocates to prepare a deed in accordance with the wishes of the second and third defendants and such a draft was prepared It was put in evidence and marked as Ex C-19 In very plain terms it said that Kamaraja No II was to have the benefit of the lands for his lifetime only This draft and the written instructions of the Madras advocates remained in the possession of the second and third defendants, who produced them in Court On the 9th June, 1934, a deed was presented to the second and third defendants for their signature and they signed it This deed followed the original draft, except that the rate of maintenance was increased to Rs 300 per mensem It purported to give an absolute interest to Kamaraja No II The ladies say that it was not read over to them and that they signed it under the impression that it was in accordance with the draft of which they had approved They averred that they signed it as the result of fraud practised by Kamaraja No II. The contesting defendants in this suit did not attempt to show who prepared this document or who gave the instructions for its preparation, but there is reason to believe that it was prepared under the instructions of V. Srinivasa Aiyar, the manager of the estate The burden of proving that these *purdanashin* ladies understood what they were signing is on those who claim the benefit of the deed. Beyond calling the Sub-Registrar who registered the document and one of the attesting witnesses no attempt has been made to discharge this burden The person who must know all about the matter is V Srinivasa Aiyar He is alive, but he was not put into the witness-box

In delivering the judgment of the Privy Council in *Farid-un-nissa* v *Mukhtar Ahmad*[1], Lord Sumner said

"The mere declaration by the settlor, subsequently made, that she had not understood what she was doing obviously is not in itself conclusive It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them Of course fraud, duress and actual undue influence are separate matters"

Later in the judgment he said ·

"As the respondents have to bear the onus of bringing home to her mind the actual import of the deed, they cannot rely on the fact that the appellant's own evidence is untrustworthy, for it is by the evidence of their own witnesses alone that this defect is established, and by that evidence they must stand The conclusion that they have failed to discharge the burden of proof is one arrived at, not out of any consideration for this lady in particular, but in defence of those strict rules which have been laid down for the protection of the defenceless in India, and it is a matter of obligation upon their Lordships to be strict and unwavering about it"

In this case the District Judge has believed the testimony of the second and third defendants and has disbelieved the evidence of the Sub-Registrar and of the attesting witness. We see no reason for taking a different view Before registering the document the Sub-Registrar recorded statements made by the second and third

1. (1925) 49 M L J. 758 L R 52 I A 342 I L R. 47 All 703 (P.C).

defendants and by their nurse Alice Maud Wells. The effect of these statements is that they had relinquished their rights in the *pannai* lands and property in Madura to Kamaraja No II There is no indication that they were asked whether they understood that they were purporting to convey to Kamaraja No. II an absolute interest in the lands or in the Madura property and we do not read the statements as indicating that the ladies understood that they were giving up their rights absolutely The deed had been executed before the Sub-Registrar arrived There is no evidence that it was read over to them before they signed it and they state emphatically that it was not. As they admitted that they had executed the document there was no need under the rules regarding registration for the Sub-Registrar to read the document over to them. If the Sub-Registrar's evidence is not acceptable, the evidence of Mallayyan Chettiar, the attesting witness, cannot be put on any higher plane. He was not required to be present at the registration and the District Judge regarded it as being incredible that he went uninvited so close to the Zanana quarters Even if the Sub-Registrar read out the document we cannot believe that he did it in a manner to make its meaning clear to the ladies who signed it.

For the plaintiff and the first defendant much stress has been laid on two petitions which the second and third defendants presented to the Deputy Collector soon after the death of Kamaraja No. II, one on the 8th April, 1941, and the other on the 10th May, 1941. In the first of these petitions it was stated that the deed merely represented an arrangement under which Kamaraja No II was to manage the properties during his lifetime and that it was vitiated by undue influence and misrepresentation They stated that it was only recently that they had become aware of the fact that the deed was capable of a construction adverse to their interests. In the second petition they took up the same attitude. It is suggested that these documents show that the ladies did understand what they were signing and that the attitude taken up by them before the Collector is inconsistent with their present plea that they executed the document without knowing what was in it and as a result of fraud and misrepresentation by Kamaraja No II There is, perhaps, here some inconsistency, but we do not regard the petitions as an acknowledgment that they fully understood the document when they signed it The document which they had signed had been kept from them all the time and we consider that it is very probable that they did not know what was actually in it when they petitioned the Collector. It is obvious that Kamaraja No II kept the document to himself because he feared that there would be litigation with the zamindar of Saptur with regard to it, as the properties would devolve upon him under the Hindu Law of Succession on the death of his sisters. The document was not produced by Kamaraja No II when he, together with his wife and sister-in-law, instituted O. S No 9 of 1933 against the zamindar of Saptur for possession of the zamin bungalow in Madura , nor was it referred to in the appeal which arose out of that suit Kamaraja No. II had managed these pannai lands from the time when Kamaluammal died in 1921 and he remained in management until he himself died on 16th February, 1941.

The important factors in the appeals now under discussion can be summarised as follows .—

1. The second and third defendants are *purdanashin* ladies and were allowed no independent advice.

2. They were strongly adverse to Kamaraja No. II having anything more than a life interest in the lands, because they feared that should he die before them they would lose their interest in the property

3. Kamaraja No. II agreed to fall in with their wishes and actually had a draft prepared in accordance therewith.

4. The appellants have not shown why those instructions were not followed, notwithstanding that if there had been no fraud, an explanation could have been given by V. Srinivasa Aiyar.

5. After its execution the deed did not see the light of day until after the death of Kamaraja No. II although it was of importance in the suit against the zamindar of Saptur with regard to the bungalow at Madura.

6 On the face of it the transaction was grossly unfair to the second and third defendants.

7 The District Judge, who had the advantage of seeing the witnesses in the witness-box, believed the second and third defendants and Alice Maud Wells in preference to the Sub-Registrar and Mallayyan Chettiar, the attesting witness.

8 Without an explanation, which is not forthcoming, it is impossible for the Court to accept that the second and third defendants abandoned their resolution not to give Kamaraja No II anything more than a life interest

9 The case falls within the judgment of the Judicial Committee, in *Farid-un-nissa* v *Mukhtar Ahmad*[1] In these circumstances we consider that the District Judge rightly decided that the second and third defendants were entitled to these *pannai* lands

We shall now summarise our findings ·

1 The family has throughout remained joint and the estate impartible.

2 Succession to the estate is governed by the rule of lineal primogeniture.

3. The plaintiff has established his right of succession to the estate

4 By reason of the family settlement of 1890 the village of Boothipuram became the private property of Kandaswami and has devolved on the second defendant.

5. The *pannai* lands referred to in clause 6 of the compromise decree became by reason of the settlement the private property of Kamaluammal and have devolved on the second and third defendants as her heirs.

6. The deed of the 9th June, 1934, is vitiated by fraud and is not binding on the second and third defendants

The result is that all the appeals are dismissed except Appeals Nos. 230 and 413 of 1943. Those appeals are allowed in so far as they relate to the second defendant's claim to Boothipuram The second defendant will pay the costs of the plaintiff and the first defendant in respect of her claim to the zamindari, based on its value, excluding Boothipuram, Dombucheri and all the *pannai* lands She will receive costs from them based on the value of Boothipuram The first defendant will pay costs to the plaintiff, based on the value of the zamindari, excluding Boothipuram, Dombucheri and the *pannai* lands, as he failed to establish his plea that the third branch had left the family The plaintiff and the first defendant will pay the costs of the second and third defendants in Appeals Nos 356 and 300 of 1943 which arose out of Original Suit No 2 of 1941 The second defendant filed a memorandum of cross-objections in Appeal No 300 of 1943 This was not pressed and is dismissed with costs in favour of the plaintiff and first defendant

We certify for two counsel

Appeals Nos 230 *and* 413 *of* 1943 *allowed in part ;*

K.S ——— *all the other Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE BELL

M Palaniappa Chettiar . . *Petitioner**

v.

Narayanan Chettiar *Respondent*

Civil Procedure Code (V of 1908), Order 26, rules 2 and 4—Commission to examine witness—Right to an order for the issue of—Matter of discretion—Circumstances to be considered

The issuing of a commission to examine a witness is a matter of discretion for the Court in the circumstances of each particular case Amongst such circumstances must be included the question whether that evidence cannot be adduced save through the particular witness concerned It is necessary for the applicant for an order for the issue of a commission to examine a witness to show

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1 (1925) 49 M L J 758 L R 52 I A 342 I L R 47 All 703 (P C)

* C R P. No. 241 of 1945 10th December, 1945.

that, unless a commission issues to take the evidence of that witness it will be impossible to place the necessary and relevant facts before the Court in support of his case

Jagannatha Sastri v *Sarathambal Ammal*, (1922) 44 M L J 202 I L R 46 Mad 574 and *Sitamma* v *Subraya*, (1911) 21 M L J 889, referred to

Where the defendant in a suit applied for the issue of a commission to examine a particular witness and the Court refused to issue it on the ground that it was unnecessary to take the evidence of that witness inasmuch as there were other means of proving the particular fact and those other means were indicated in the order and it was also found that the application was vexatious,

Held, that in the circumstances, the Court had correctly appreciated the principles involved

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Devakottah, dated 11th January, 1945, in I A No 1 of 1945 in O S No 199 of 1944.

K. R. Rama Aiyar for Petitioner.

R. Rangaswami Aiyangar for Respondent

The Court delivered the following

JUDGMENT —The learned counsel for the petitioner has said everything that he can say on behalf of his client, but I am satisfied that this is not a case in which I should interfere with the order of the lower Court

The petition arises out of an application by the defendant in a suit under Order 26, rules 2 and 4 of the Civil Procedure Code and section 151 for the issue of a commission to examine a witness in Madras The suit was filed in the District Munsiff's Court, Devakottah, on a promissory note which had been executed by the defendant and had been endorsed to the plaintiff The defendant apparently urged that the endorsement in some way or another was not valid, and in support of this contention he desired to adduce the evidence of an advocate who has ceased to practice in that Court and is at present employed in Madras He says that this gentleman was appearing in Court as an advocate in another case, in which the defendant's wife was the plaintiff, and in which the endorser of the note appeared as a witness and was about to but somehow did not produce in evidence the promissory note in question. It is said that the date on which this incident occurred was subsequent to the alleged date of the endorsement, the inference being, I suppose, that the date of the endorsement is fictitious.

The respondents filed an affidavit saying that it was unnecessary to call this Madras gentleman because in the case referred to, he appeared with another advocate, who is still in Devakottah and who can give, if necessary, the same evidence. The District Munsiff considered these facts and contentions and held that it was unnecessary to take the evidence of the Madras gentleman, not only because the other advocate is still available if required but that the defendant was not without other means of proving this particular fact, if he so desired, and the District Munsiff pointed out these other means in his order Furthermore, he came to the conclusion that the application was a vexatious one, that is to say, that it was an abuse of the process of Court and was filed only with a view to protract the litigation On the facts this conclusion would not seem to be out of the way

Two cases have been cited to me in support of the contention that a party has an absolute right to an order for the issue of a commission to take evidence. The first was *Jagannath Sastri* v. *Sarathambal Ammal*[1], a decision of Wallace, J There the learned Judge held that a commission should issue as a matter of right unless the Court is satisfied that the application is an abuse of the process of Court. On the finding, therefore, of the District Munsiff that this particular application was an abuse of the process of Court this case does not support the petitioner's argument With great respect to the learned Judge, I would not go so far as he with regard to the principles applicable to the issue of commissions. In my opinion, it is a matter of discretion for the Court in the circumstances of each particular case

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1. (1922) 44 M L J 202 I L R. 46 Mad. 574

The other case cited *Sitamma* v *Subraya*[1] is however a Bench decision and the headnote reads

"A party to a suit has a right to the issue of a commission . apart from the question whether he would be ultimately benefited by it"

An examination, however of this judgment, shows that it is one on the particular facts of that case, and I do not read it as laying down the principle that the application for the issue of a commission must succeed without the Court's considering the circumstances of the case, and amongst those circumstances must, in my opinion, be included the question whether that evidence cannot be adduced save through the particular witness mentioned in the application I think it must be necessary for the applicant to show that, unless a commission issues to take the evidence of the person desired, it will be impossible to place the necessary and relevant facts before the Court in support of his case

In my opinion, the learned District Munsiff has correctly appreciated the principles involved and this petition must be dismissed with costs.

V.P.S ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE WADSWORTH AND MR JUSTICE RAJAMANNAR.

Jainambukanni Ammal and another *Appellants**

v

Ruthrapathy Pillai and others *Respondents*

Civil Procedure Code (V of 1908), section 92—Charity whether true beneficiary or entitled only to a charge for its performance—Test—Property endowed and temple situate in British India but income to be applied abroad—Suit under section 92, Code of Civil Procedure (V of 1908), in respect of such properties—Jurisdiction of British Indian Court

A settlement deed was in the following terms I have made the following arrangement in respect of the property specified hereunder which was acquired by me out of my own earnings, and which has been in my enjoyment with *miras* for the salvation of my soul Out of the funds of the aforesaid property *thannirpandal* (water-shed) charity shall be conducted for seven days on the occasion of the Masi Makham festival of Sri Souriraja Perumal at Thirukannapuram During the Makham festival, 100 persons shall be fed and the charity conducted Out of the income derived from the aforesaid land, excluding the Government kist, etc, and expenses in connection with the charity the remaining income shall be utilised for the maintenance of my sons who have come from the east, *viz*, (1) *S* and (2) *N* and (3) my wife *T* The aforesaid charity and the aforesaid property shall be managed by my eldest son-in-law *G* After the said *G* the aforesaid charity and the said family shall be managed by his nominee

G obtained a release from the sons *S* and *N* and executed a will treating the property as absolutely his own, subject to an obligation to conduct the charity, making provision for payment of maintenance to members of his family and making his son *M* the trustee of the charity, after him After *G's* death *M* became trustee in accordance with the will but sold the property to various people

In a suit under section 92 of the Code of Civil Procedure for removal of the trustee, setting aside of the alienations and framing of a scheme in respect of the charity,

Held, (1) reading the settlement deed as a whole there was no gift of the surplus income or the property to the sons or members of the family generally

(2) The charity itself is the true beneficiary and *G* should be considered to be a trustee of the charity and the only obligation of the trustee, for the time being, was to utilise the surplus income, if any, for the maintenance of the three specified relatives after whose death or effacement otherwise, there would be no obligation on the trustee to utilise any part of the income of the property for any object other than the charitable object mentioned in the document

(3) *M* as trustee was not entitled to alienate the properties which belonged to the trust, as in the absence of any necessity of the charity the alienations will not be binding on the charity

(4) The temple of Sri Souriraja Perumal being at Thirukannapuram which is admittedly in British India the fact that on Masi Makham day, the deity is taken to the beach in Thirumalarayanpatnam which is in the French territory cannot deprive the British Indian Court of jurisdiction to entertain the scheme suit The temple as well as the property being in British India no relief in respect of the property can be obtained except from a British Indian Court

Bilasrai Joharmal v *Shivnarain Sarupchand*, (1944) 1 M L J 466 L R 71 I A 47 (P C), distinguished and In re *Duncan* In re *Taylor's Trusts*, (1867) 2 Ch App 356, relied on

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1 (1911) 21 M L J 889

* Appeal No 414 of 1944 7th November, 1945.

Appeal against the decree of the District Court, East Tanjore, Negapatam, in O S. No 2 of 1943.

K. V Ramachandra Aiyar and *S Thyagaraja Aiyar* for Appellants.

C A Seshagiri Sastri and *K Muthuswami Chettiar* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, J.—This appeal arises out of a suit filed by two persons interested in a certain charity to be conducted on the occasion of the Masi Makham festival of Sri Souriraja Perumal at Tirukannapuram as provided in a deed of settlement executed by one Marimuthu Pillai on 4th February, 1911, for the removal of the first defendant who purported to be the trustee at the time of the institution of the suit, for the framing of a scheme in respect of the charity and to declare certain alienations made by the first defendant in favour of the fourth and the seventh defendants invalid and not binding on the trust and to appoint a fit and proper person as trustee in place of the first defendant The suit was filed after obtaining the sanction of the Advocate-General under section 92 of the Code of Civil Procedure The learned District Judge of East Tanjore has substantially decreed the suit as prayed for and the sixth and seventh defendants appeal, the sixth defendant being a purchaser from the fourth defendant of the property alienated to him

Marimuthu Pillai executed on the 4th February, 1911, a settlement deed on the construction of which depends the determination of the main question arising in this appeal. The document runs as follows :

"I have made the following arrangement, in respect of the property specified hereunder which was acquired by me out of my own earnings, and which has been in my enjoyment with *miras* for the salvation of my soul Out of the funds of the aforesaid property, *thannir pandal dharmam*, *i e*, water-shed charity shall be conducted for seven days on the occasion of the Masi Makham festival of Sri Souriraja Perumal at Thirukannapuram During that Makham festival day, 100 persons shall be fed and the charity conducted Out of the income derived from the aforesaid land, excluding the Government kist, etc , expenses in connection with the charity the remaining income shall be utilised for the maintenance of my sons who have come from the east, *viz*, (1) Subramaniam, (2) Natesan and (3) my wife, Thillai Ammal The aforesaid charity and the aforesaid property shall be managed by my eldest son in-law, N Govindaswami Pillai After the said Govindaswami Pillai the aforesaid charity and the said family shall be managed by his nominee The aforesaid Govindaswami Pillai shall perform obsequies, etc , to me, as well as to my wife "

The contention of the appellants is that under this document the charity is only entitled to a charge for an amount necessary to carry out the objects mentioned in the deed and that the property iteself was not dedicated for the benefit of the charity. The appellants also contend that in any event the legal heirs of the settlor are entitled to the property under the document subject no doubt to an obligation to have the charity conducted as provided therein The status of Govindaswami Pillai was not made clear by the learned advocate for the appellants, but as we understand him, Govindaswami Pillai was only a manager with no legal title to the property and he did not occupy even the position of a trustee The contention of the contesting respondents (plaintiffs) is that taking all the terms of the deed into consideration together with the surrounding circumstances, the entire property was dedicated to the charity subject only to an obligation on the part of the manager to utilise the surplus income, if any, for the maintenance of three named individuals who were also related to the settlor

In such cases the only rule which appears to be established from the decided cases is that there cannot be any fixed and absolute rule to construe the effect of any particular document In *Harnarain* v *Surja Kunwari*[1], Lord Shaw in delivering the judgment of the Judicial Committee said

"The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or that, on the other hand, these heirs shall be considered the true beneficiaries of the property subject to a charge for the upkeep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will "

Having regard to these observations, it is necessary to deal with the provisions of the deed before referring to some of the decided cases cited on behalf of the appellants before us.

1. (1921) L.R. 48 I.A 143 . I.L R 43 All 291 (P C)

The dominant intention of the settlor which appears from the preamble to the deed was clearly to dedicate property to a religious charity for the attainment of salvation There is no intention either expressed on the face of the document or which could be necessarily implied, to confer any benefit on his heirs in general It is significant that even in the clause which provides for the maintenance of the three relatives the words " and their heirs " or " and their descendants " or the words " from generation to generation " are absent

Reading the document as a whole, it is impossible for us to discover any gift of the surplus income or the property either to the sons or to the members of his family generally , nor do we find any expressed intention to make a residuary gift in favour of them The three individuals are mentioned as *personae designatae* rather than as members of his family. The next important circumstance appearing from the face of the document is that though he mentions two persons as his sons who have come from the east, he totally disregards them. They have no right even to manage the charity and the property Even the obsequies to be performed for himself and for his wife are directed to be performed not by the sons, as would in the ordinary course be expected from a Hindu, but they are directed to be performed by the son-in-law Govindaswami Pillai After the death of Govindaswami Pillai, the person to manage the charity and the family is to be a person nominated by Govindaswami Pillai and not any of his heirs or descendants These circumstances clearly distinguish this case from the rulings relied on by the advocate for the appellants in *Ashutosh Dutt* v *Doorga Churn Chatterji*[1], *Sonatun Bysack* v. *Sreemutty Juggutsoondaree Dossee*[2], and *Thiruvengadamudayanaiya* v *Narasimhaswamiaiya*[3] In all these cases there was a gift or a bequest in favour of the heirs or the members of the family or in favour of a residuary legatee Such a provision is significantly absent from the deed which we have to construe in this case and we attach great importance to the omission of words indicating a gift to any member of the family or to the heirs of the settlor generally.

In most of the decided cases, importance has been attached to the fact tha the charity provided by a particular document was not capable of expansion and in such cases when the income of the property in question far exceeded the requirements of the charity as fixed in and by the deed itself, it has been held that the charity will not be entitled to the surplus Whether in such a case the donees under the document would take the surplus or the surplus would fall into the residue does not directly arise in this case But we are clearly of opinion that the charity specified in the document in this case is not a charity which is incapable of expansion Though hundred persons are directed to be fed, the amount to be expended is not fixed, nor the nature of the feeding Likewise no amount is fixed for the expenses to be incurred for the water-shed charity In these circumstances, it is not possible to say that any part of the income has been unalterably fixed by the settlor for the expenses of the charity with the result that there is bound to be a surplus disposed of or undisposed of by the document Moreover, from the evidence on record, it does not appear that at the time of the settlement deed or even subsequently there was the likelihood of a large surplus In 1921 one of the sons Subramaniam executed a deed, Ex P-2 releasing all his rights under the deed to Govindaswami Pillai, the son-in-law, in consideration of a sum of Rs 100 It is recited in that deed that " the funds out of the property were not sufficient to meet the expenses." Similar recitals are to be found in another release deed executed by the other son Natesa on 18th April, 1927, Ex P-2-a In this instance also, the release was for a sum of Rs 100 Even at the present time it is probable that very much would not be left after providing for the kist for the legitimate expenses of the charity. The evidence is, about a 100 kalams would be the melwaram which at the normal rate of Rs 1-4-0 would come to Rs 125 for the year Deducting the sum of Rs 80 payable as kist, the net income would be about Rs 45 The estimate of P. W. 1 and P. W 2 that for the conduct of the charity, a sum of at least Rs 60 would be aequired does not appear to be extrvagant

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1 (1879) L R. 6 I.A. 182 . I.L R. 5 Cal. 438 (P.C.).
2. (1859) 8 M I A 66
3. (1941) 1 M.L J. 488.

Taking all the circumstances into consideration, we are clearly of opinion that the charity itself is the true beneficiary and Govindaswami Pillai should be considered to be a trustee of the charity and the only obligation of the trustee, for the time being, was to utilise the surplus income, if any, for the maintenance of the three specified relatives of the settlor mentioned in the deed On the death of the three specified relatives or their effacement otherwise, there would be no obligation on the trustee to utilise any part of the income of the property for any object other than the charitable object mentioned in the document

Govindaswami Pillai after obtaining the two release deeds above mentioned from the two sons of the settlor executed a will, Ex P-3, on the 28th December, 1932 Therein he treats the property as absolutely his own, subject to an obligation to conduct the charity, and makes provision for payment of maintenance to members of his family and appoints his son Murugayya Pillai, the first defendant to be trustee of the charity after him Govindaswami Pillai died sometime in 1933 and the first defendant became the trustee in accordance with the will He sold on 20th October, 1934, two acres, sixty one cents, out of the property covered by the settlement deed for a sum of Rs 500 to his sister the fourth defendant. She in turn conveyed the property purchased by her to the sixth defendant by a sale deed, dated 25th June, 1939 The first defendant sold the rest of the properties to the seventh defendant by a sale deed, dated 25th January, 1941 It follows from what we have held that the first defendant as trustee was not entitled to alienate the properties which belonged to the trust, as the alienations were not sought to be supported on the ground of necessity The learned District Judge was right in declaring these two alienations not binding on the charity

The learned advocate for the appellants next contended that no Court in British India would have jurisdiction to entertain this suit, because the charity in question had to be performed at a place which was situated in French India The deed of settlement itself does not mention the place where the charity has to be conducted The temple of Sri Souriraja Perumal is at Tirukkannapuram which is admittedly in British India But it appears from evidence that on Masi Makham festival day, the deity is taken to the beach in Tirumalairajapatnam which is in French territory. The recent decision of the Judicial Committee in *Bilasrai Joharmal* v *Shivnarain Sarupchand*[1] is relied on in support of this contention The facts of that case were peculiar and are totally different from the facts of the present case In the case before the Judicial Committee, the public charity which had to be conducted was a hospital at a town in Jaipur State The plaint in that case prayed for the removal of the defendants from their office as trustees and for the appointment of new trustees and the sole ground of complaint was that the defendants had without authority changed the name of the hospital It was held that it would be inconvenient if not intolerable, that the High Court of Bombay should interpose their authority upon the questions arising in the course of administering a trust which was solely situate in a foreign territory Their Lordships point out that the plaintiffs should be left to pursue their remedy from the Courts of the country in which the hospital is carried on and whose poor are the beneficiaries of the charity But they also point out that the question with which they had to deal in that case was not a case relating to any step to safeguard trust funds which lay within the jurisdiction of the British Indian Court or to protect and preserve such funds. At page 469 their Lordships say :

"The case is not one of founding a charity abroad, or settling a scheme for a charity to be conducted abroad, nor of preserving the property of a foreign charity, nor of assisting a foreign charity or a foreign Court to collect or administer funds within the jurisdiction "

It has been held in England—see In re *Duncan* . In re *Taylor's Trusts*[2]—that the authority of the Charity Commissioners extends to charities endowed in England or Wales, although the revenues are applied abroad. In that case the properties (certain freehold and leasehold estates) were situate in England the object of the trust being the promotion of Christian education in the Island of Jamaica. Turner, L.J., says at page 360 :

1. (1944) 1 M.L J. 466 : L.R. 71 I.A. 47 (P.C). 2. (1867) 2 Ch. Ap. 356.

"The foundation and institution of the charity ought, I think, generally speaking, to be considered as taking effect in England or Wales, within the meaning of the Act, if the application of the charity be there and the endowment abroad, or the endowment be there and the application abroad, both the property and the application of it being, in effect, parts of the endowment and institution"

In the present case, the property is in British India and the temple itself is situate in British India No relief in respect of this property can be obtained except from a British Indian Court and we do not see any reason to hold that the District Court of East Tanjore within whose jurisdiction the temple and the properties are situate had no jurisdiction to entertain the present suit

The appellants have failed on both the points raised before us and the appeal is dismissed with costs of the plaintiffs (respondents 1 and 2).

K S ——— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE LAKSHMANA RAO

Moolchand Jothajee *Appellant**

v

Rashid Jamshed Sons & Co , by its Proprietor, S R. Ahestani . *Respondent.*

Arbitration Act (X of 1940), *sections* 31 *and* 32—*Scope and effect—Party to award—Not entitled to enforce it by way of suit—Specific Relief Act (I of* 1877), *section* 30—*Effect*

A party to an arbitration award under the Indian Arbitration Act (1940) (unlike under the Indian Act of 1889 and the English Act as amended in 1934) is not entitled to enforce such award by way of suit Section 30 of the Specific Relief Act is subordinate to and does not override section 32 of the Arbitration Act which bars such a suit

Nanhelal Anandilal v *Singhai Gulabchand*, I L R (1944) Nag 340, not followed and *Ratanji Virpal & Co* v *Dhirajlal Manilal*, I L R (1942) Bom 452, approved

(1945) 2 M L J 98, affirmed

Appeal under clause 15 of the Letters Patent against the judgment and decree of Somayya, J ,† dated 28th March, 1945, and passed in C C C A No 77 of 1944 preferred against the decree of the Principal City Civil Court Judge, Madras, dated 21st August, 1945, in O S No. 851 of 1941.

Subramaniam and *Rajagopal* for Appellant.

S Srinivasa Raghavan for Respondent

The Judgment of the Court was delivered by

The Chief Justice —While the Indian Arbitration Act, 1889, was in force a party to an arbitration award was entitled to enforce it by way of suit. The question in this appeal is whether he has the same right now that the Indian Arbitration Act, 1940, is in force

The appellants entered into a contract with the respondents to sell to them a certain quantity of camphor. The respondents failed to take delivery of the goods in accordance with the terms agreed upon and consequently the appellants sold the camphor The price realised was less than that which the respondents had contracted to pay and they failed to pay the difference The contract provided that disputes in relation to it should be referred to the arbitration of the Madras Kirana Merchants' Association. The appellants referred the dispute to arbitration in accordance with the agreement and the arbitrators found that they were entitled to receive from the respondents by way of damages the sum of Rs 1,605-6-0 The appellant did not, however, ask the arbitrators to file the award in Court. They took no action until they filed in the City Civil Court the suit out of which this appeal arises The award was delivered on the 17th September, 1940, and the suit was filed on the 2nd May, 1941 The appellants averred that the award had become "final, conclusive and binding on the parties" and asked for a decree in the terms thereof The respondents denied that there had been a valid reference to arbitration and consequently they averred that there was no proper award. They further pleaded that the award was vitiated by the misconduct of the arbitrators

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* L. P A No 49 of 1945 18th December, 1945

† (1945) 2 M L J 98

and had been improperly procured The appellants contended that it was not open to the respondents to maintain these pleas They said that as the respondents had neglected to cause the award to be filed in Court they (the appellants) became automatically entitled to a decree in the terms of the award on the expiration of the three months allowed for its filing. The Principal Judge of the City Civil Court who tried the suit found for the appellants but his decision was overruled by Somayya, J, on appeal[1] Consequently the learned Judge dismissed the suit This appeal is from his judgment

It is an elementary principle of law that where a remedy has existed by way of suit, the remedy continues to exist, unless it is taken away by statute, either expressly or by necessary implication The appellants say that the Indian Arbitration Act, 1940, has not taken away their right to institute a suit to enforce the award and that the learned Judge misinterpreted the provisions of the Act Therefore it is incumbent upon us to examine the relevant sections of the statute

Section 14 (1) says that when the arbitrators have made their award, they shall sign it, and give notice of the fact in writing to the parties Sub-section (2) says that the arbitrators shall, at the request of a party, cause the award to be filed in Court, and, when this is done, the Court shall give notice of its filing to the parties. Sections 15 and 16 empower the Court to modify the award or to remit it to the arbitrators for further consideration Section 17 states that when the Court sees no cause to remit the award for reconsideration, it shall, after the time for making an application to set it aside has expired, or when such an application has been made and refused, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow. No appeal lies from the decree except on the ground that it is in excess of, or not otherwise in accordance with, the award

Section 15 of the old Act provided that an award, on being filed in Court, should be enforceable as if it were a decree of the Court Now it is made a decree of the Court when judgment has been pronounced in accordance with the terms of the award Section 17 of the new Act brings the statute in accordance with the provisions of the English Arbitration Act of 1934

Sections 31 and 32 of the Indian Act of 1940 have great bearing on the question to be decided in this appeal, and we will quote them *in extenso.*

Section 31 reads as follows :

"(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed and by no other Court

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed and to no other Court

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court"

Section 32 states :

"Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act"

Section 33 provides that a party to an arbitration agreement or award desiring to challenge the existence or validity of the arbitration agreement or award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits, provided that where the Court deems it just and expedient, it may allow other evidence to be admitted

1. (1945) 2 M L J 98.

By reason of section 31 no Court other than that in which the award has been, or may be, filed has jurisdiction to decide any question relating to the validity, effect or existence of the award Section 32 emphasises this by stating that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of the award

The Act of 1940 was intended to consolidate and amend the law of India relating to arbitration matters. The scheme of the Act is to prevent the parties to an arbitration agitating questions relating to the arbitration in any manner other than that provided by the Act The suit which the appellants filed clearly raised the question with regard to the existence and validity of the award, and such a suit is expressly barred by section 32

The learned advocate has laid great stress on the fact that the Act of 1940 has not repealed section 30 of the Specific Relief Act, that it has not eliminated Form No 10 from Appendix A to the Code of Civil Procedure and that under the English Act a suit may be filed in order to enforce an award without making it a judgment of the Court Section 30 of the Specific Relief Act merely says that the provisions of Chapter II as to contracts shall *mutatis mutandis* apply to awards and to directions in a will or codicil to execute a particular settlement This section obviously cannot override section 32 of the Indian Arbitration Act, 1940, which applies " notwithstanding any law for the time being in force " The governing section is section 32 of the Arbitration Act We fail to see what bearing Form No 10 printed in Appendix A to the Code of Civil Procedure has Even if it has bearing, it is not of any importance because section 30 of the Specific Relief Act is subordinate to section 32 of the Arbitration Act The fact that in England, notwithstanding the amendment to the English Act of 1889 by the Act of 1934, a suit can be filed to enforce an award notwithstanding that judgment has been entered in the terms of the award does not assist the appellants, because in the English Act there are no corresponding provisions to those to be found in sections 31 and 32 of the Indian Act

A single Judge of the Nagpur High Court in *Nanhelal Anandilal* v *Gulabchand*[1] accepted the argument now advanced on behalf of the appellants, but the judgment does not discuss the question On the other hand in *Ratanji Virpal and Co* v *Dhirajlal Manilal*[2], the Bombay High Court read section 32 in the way which we read it

We regard sections 31 and 32 as being conclusive against the appellants and consequently we hold that the suit does not lie. The appellants have only themselves to blame for not causing the award to be filed in Court The appeal is dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE RAJAMANNAR.

Mahommad Isack *alias* Papa Saheb .. *Appellant**

v

Doddapaneni Sreeramalu *Respondent*

Contract Act (IX of 1872), sections 23 and 27—Agreement between two competing motor-busowners for a license to carry mails—Stipulation by one to withdraw his tender upon the other paying him some money—Failure by the party undertaking to pay money—Suit by the other party to enforce the agreement—Agreement not invalid under section 23 or section 27 of the Contract Act

Two owners of motor-buses, plaintiff and defendant, who each sought for himself a license from the postal authorities to carry mails between two places, entered into an agreement by which the defendant was to secure the license and the plaintiff was to withdraw his tender In consideration of such withdrawal the defendant had to pay a certain amount to the plaintiff in instalments The defendant, after withdrawal of the tender by the plaintiff, obtained the license for himself but failed

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1 I L.R (1944) Nag 340

2. I L R. (1942) Bom 452

* S A. No. 517 of 1945 13th December, 1945.

to pay the plaintiff the amount stipulated in the agreement In a suit by the plaintiff to enforce the agreement, on a plea that it was opposed to public policy, and therefore unenforceable,

Held, that the agreement was not invalid under section 23 or under section 27 of the Indian Contract Act

Hari Balkrishna Joglekar v *Naro Moreshwar Joglekar*, (1893) I L R 18 Bom 342, applied, *Thangavelu Chetti* v *Mukunda Naidu*, (1914) M W N 108, *Bhurmal Ramkaran* v *Goduram Mangalchand Jat*, I L R (1943) Nag 565 and *Putulal* v *Raj Narain*, (1931) I L R 53 All 609, distinguished

Appeal against the decree of the Court of the Subordinate Judge, Ellore, in A S No 219 of 1944 (A S No 94 of 1944, District Court, Ellore) preferred against the decree of the Court of the District Munsiff, Ellore, in O. S. No. 353 of 1942

Ch Raghava Rao for Appellant

V Rangachari for Respondent

The Court delivered the following

JUDGMENT —The only question that falls for decision in this second appeal is whether the agreement on which the suit has been brought by the respondent is opposed to public policy and therefore unenforceable The facts in so far as they are relevant for disposal of this issue are these The plaintiff and the defendant are owners of motor buses Both the plaintiff and the defendant made tenders to the postal authorities to secure the license for carrying mails between Ellore and Chintalapudi The defendant who desired to secure the license himself entered into the agreement now in suit, Ex P-1 Under the agreement the defendant was to secure the license and the plaintiff was to withdraw his tender. In consideration of the withdrawal by the plaintiff the defendant had to pay to the plaintiff Rs 15 per month for a certain period and Rs 20 per month in a certain contingency. It is not necessary to go into more detail as to the other terms, as they are not material for the second appeal The defendant after the withdrawal of the plaintiff of his tender obtained a license from the postal authorities but failed to pay the amount according to the agreement The plaintiff was therefore compelled to file the suit out of which this second appeal has arisen

There were two main defences, one on the ground that the contract was unenforceable being opposed to public policy and the other, that the contract was not supported by consideration The learned District Munsiff of Ellore dismissed the suit holding that the contract was opposed to public policy He however held that the agreement was supported by consideration, the consideration being the withdrawal of the plaintiff of the tender submitted by him to the postal authorities. The learned Subordinate Judge on appeal disagreed with the finding of the learned District Munsiff that the contract was opposed to public policy and apparently, as the plea of absence of consideration was not pressed before him, he did not consider it and proceeded to grant a decree in favour of the plaintiff as prayed for.

In the second appeal the learned advocate for the appellant desired to raise the question of consideration, but I do not think that he should be allowed to do so Not only was this point evidently not pressed before the learned Subordinate Judge in appeal but the point was not even taken in the memorandum of grounds of second appeal

The only question therefore is whether the agreement is opposed to public policy or is otherwise void and unenforceable. The appellant's counsel sought to bring the agreement within the mischief of section 27 of the Contract Act which is in these terms ·

"Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void "

The other section which might possibly be pressed into service is section 23 of the Act which *inter alia* declares :

"The consideration or object of an agreement is lawful, unless . . . . . . the Court regards it as immoral, or opposed to public policy."

He strongly relied on the decision of Wallis, J, sitting on the original side reported in *Thangavelu Chetti* v *Mukunda Naidu*[1] In that case the agreement was between two landing contractors Their profession was to supply labour for unloading cargo from steamers The agreement in that case provided that the plaintiff should refrain from supplying coolies to one Chockalinga Naicker so long as they carried on business of landing agents for coal steamers at Madras and in consideration of the plaintiff so abstaining from supplying coolies, the defendant should pay to the plaintiff a sum of Rs 50 for every coal steamer for which they become landing contractors. The learned Judge held that the agreement was void under section 27 of the Contract Act as being in restraint of the exercise of a lawful profession At page 111 he says "This, it seems to me, is clearly an agreement by which the plaintiff is restrained from exercising a lawful trade or business" In my opinion this decision has no bearing on the facts of the present case What the plaintiff and the defendant here were seeking to do was to obtain the benefit of a contract from the Government. *Ex hypothesi* only one of them could get it. The analogy completely breaks down because under no circumstances could more than one person have license from the Government to carry the mails from a specified place to another specified place It is impossible to treat the obtaining of the license from Government as in the nature of a trade or calling The decision of the Nagpur High Court in *Bhurmal Ramkaran* v *Goduram Mangalchand Jat*[2] appears to have been relied on in the lower Courts for the defendant On an examination of the facts of that case it will appear that the decision in that case could not possibly govern the present case There one *D* had obtained a contract from the Government to carry postal articles and there was a provision in that contract that no part or interest in the contract should be transferred to any other person without the consent of the postal authorities *D* however entered into a contract with *P* under which the lorries were to be transferred to *P* who was to become their owner and *D* should try to procure a transfer of the contract to *P*. If for any reason *D* failed to have the contract transferred to the name of *P*, nevertheless *D* was to run the service only in name but *P* was to be virtually the proprietor of the service. The learned Judges held that such an agreement, which contemplated the contingency of the contract standing in the name of one person while another was virtually to be in control owing to his ownership of the transport vehicles, was likely to lead to a condition of affairs which would seriously interfere with the proper maintenance of a service vital to the public They also held that such an arrangement would involve deceiving the Government into thinking that the person to whom they had granted the contract was the person actually conducting the service The contract was therefore declared to be void as opposed to public policy under section 23 of the Contract Act. In this case it is not suggested that the person to whom the license was to be granted, namely the defendant, was not the person who was to have the control of the service.

The decision of a single Judge of the Allahabad High Court in *Putulal* v. *Raj Narain*[3] was also cited before me In that case, Sen, J, held that an agreement by one co-sharer in a mahal to pay a certain sum of money annually to another co-sharer in the same mahal in consideration of the latter withdrawing his candidature for lambardarship in favour of the former amounted to an agreement to bargain or traffic relating to a particular office and therefore was opposed to public policy. Obviously the *ratio decidendi* of that case was that the office of lambardar was a public office and any private arrangement in regard to the appointment for that office should not be upheld. The ground on which the learned Judge thought that the contract was opposed to public policy was that it savoured of traffic relating to a public office In the present case there is no such public office involved.

I agree with the learned Subordinate Judge in thinking that the nearest approach to the present case is the case where there is an agreement between intending bidders that one should keep off from bidding. Such an agreement was considered as not being opposed to public policy by the Bombay High Court in *Hari Balkrishna Joglekar* v. *Naro Moreshwar Joglekar*[4]. Sargeant, C J., said :

1 (1914) M.W.N 108.
2. I.L.R. (1943) Nag. 565.
3 (1931) I L R. 53 All. 609
4. (1893) I.L R. 18 Bom. 342.

"But there is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction sale."

The Judicial Committee in *Mohamed Mira Rowther* v. *Savvasi Vijaya Raghunadha Gopalar*[1] apparently did not consider the practice of dissuading intending bidders from actually bidding at an auction as fraudulent. If an agreement to refrain from bidding at an auction is not opposed to public policy, I fail to see how an agreement for the withdrawal of a tender, which is also in the nature of an offer or a bid, should be declared unlawful. I hold that the agreement in suit is not invalid under section 23 or under section 27 of the Indian Contract Act.

The second appeal is therefore dismissed with costs. Leave refused.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Kuppuswami Pillai .. *Appellant**

v.

The Taj Fraksha Thaikkal Estate by its managing trustee Katheeb M. K. Noor Sheriff and another .. *Respondents.*

Court-fees Act (VII of 1870 as amended), section 7 (v) (c)—Inam land—Calculation of 'net profits'—Deduction of melwaram—Whether permissible.

Where the kudiwaram interest in certain inam lands is the subject matter in dispute, and the 'net profits' of the lands have to be ascertained for purpose of section 7 (*v*) (*c*) of the Court-fees Act, the rent or melwaram admittedly payable on the land to the landholder should be deducted from the gross income.

Ratnavelu Pillai v. *Varadaraja Pillai*, (1942) 1 M.L.J. 569, overruled.

Appeal against the order of the District Court, East Tanjore, at Negapatam, dated 21st July, 1944, in A.S. No. 17 of 1944 preferred against the order of the Court of the Subordinate Judge, Mayavaram, in O.S. No. 20 of 1943.

This appeal came up in the first instance before Rajamannar, J., who made the following

ORDER OF REFERENCE:—The substantial question in this appeal is whether the plaint has been properly valued for purposes of Court-fee and jurisdiction. The suit was brought for delivery of possession of certain lands in an inam village and for mesne profits. The appellant was the plaintiff. There were two defendants. The first defendant was the inamdar (landholder) and the second defendant was a person who had obtained possession of the suit properties from the first defendant. The plaintiff alleged in the plaint that he was entitled to occupancy rights in the lands and the landholder (the first defendant) was not entitled to lease the lands to the second defendant and to put him in possession. The plaintiff admits that the first defendant is the landholder and that he is entitled to the rent on the land. The suit was valued under section 7 (*v*) (*c*) of the Court-fees Act at fifteen times the net profits which according to the plaintiff arose from the lands during the year next before the date of the presentation of the plaint. The District Judge has held that the plaintiff's method of calculation of the net profits is wrong because in arriving at the net profits he had deducted from the gross income the amount of rent payable on the land. The District Judge directed the deficit Court-fee to be paid and remanded the suit to the lower Court to be disposed of according to law.

In the appeal the learned advocate for the plaintiff-appellant urged two grounds: (1) that the plaint was valued on a wrong basis and that it really falls under section 7 (*xi*) (*e*) of the Court-fees Act, and (2) that the method of calculation of the net profits adopted by him is correct.

There is no substance in the first contention. Even if anything can be said in favour of the appellant if the suit had been instituted only against the landholder, it is impossible to treat the present suit, filed as it is not only against the landholder but also against the second defendant who according to the plaintiff is really in the position of a trespasser, as a suit falling within that provision of the Court-fees Act. I am unable to agree with the reasoning in *Secretary of State* v. *Dinshaw Navroji*[2], which was relied on by the advocate for the appellant.

The second contention of the appellant turns on the question whether in the calculation of the net profits under section 7 (*v*) (*c*) of the Court-fees Act, the rent or melwaram admittedly payable on the land should be deducted from the gross income. The District Judge following the decision of Chandrasekhara Aiyar, J., in *Ratnavelu Pillai* v. *Varadaraja Pillai*[3] had held that such a deduction is not permissible. For the appellant it is argued that to arrive at the net profits it is necessary that the rent which is a first charge on the land should be deducted.

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1. (1899) 10 M.L.J. 1: L.R. 27 I.A. 17: I.L.R. 23 Mad. 227 (P.C.)

* A. A. O. No. 38 of 1945. 17th December, 1945.

2. A.I.R. 1925 Sind 275.

3. (1942) 1 M.L.J. 569.

With great respect, I am unable to agree with Chandrasekhara Aiyar, J, and I think that his decision requires reconsideration The learned Judge held that in the context in which the words "net profits" are used in the Court-fees Act they meant the net income from the land after deducting from the gross yield the charges of labour and cultivation Logically I fail to see why if the charges of labour and cultivation have to be deducted, the rent on the land should not be In fact the rent will form the first item in the outlay for earning income from the land

It is well known that even in the calculation of mesne profits as against a trespasser deduction is made of revenue or rent and other outgoings in respect of the land

Cases in which if the rent is deducted the result may be that the liabilities far exceed the income do not present any difficulty because the Legislature has provided for such cases in the last part of section 7 (*v*) (*c*), namely, "where no such net profits have arisen therefrom—the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood."

It does not appear to me to be a reasonable construction of the words "net profits" to hold that in the calculation of such net profits there should be no deduction of the amounts paid by way of rent or other statutory dues The only decision which has some bearing on this question is *Maroof Sahib* v *Ayyakannu Naicker*[1], a decision which was very properly brought to my notice by the learned Government Pleader There in construing section 7 (*v*) (*d*) of the Court-fees Act it was held that in assessing the market value of lands in an estate the Court should determine the value of the kudiwaram interest in the lands leaving allowance for the melwaram right which was not in dispute

It should not be overlooked that in this case the plaintiff does not claim any right to the entire interest in the land He concedes the melwaram interest of the first defendant (the landholder) and his claim is only in respect of the kudiwaram interest In this view also it appears to be unjust to call upon the plaintiff to value also the melwaram interest which would be the eventual result if the construction pressed upon me by the contesting respondent in the case is accepted.

As in my opinion the decision in *Ratnavelu Pillai* v *Varadaraja Pillai*[2], requires reconsideration, the case may be heard by a Division Bench

M S Venkatarama Aiyar for Appellant.

The Government Pleader (*K Kuttikrishna Menon*) and *Pais, Lobo* and *Alvares* for Respondents.

In pursuance of the aforesaid Order, the appeal came on for hearing before the Bench as constituted above and the judgment of the Court was delivered by

The Chief Justice.—The short question in this appeal is whether *Ratnavelu Pillai* v *Varadaraja Pillai*[2] was rightly decided.

The appellant in the present case is the plaintiff in the suit, which he filed in the Court of the Subordinate Judge, Mayavaram, for recovery of possession of certain lands in an inam village and for payment to him by the second defendant of mesne profits There are two defendants The first defendant is the landholder The second defendant has been admitted into possession of the property by the first defendant. The plaintiff says that he is entitled to occupancy rights in the land and that the landholder had no right to lease the land to the second defendant. He valued the relief under section 7 (*v*) (*c*) of the Court-fees Act at fifteen times the net value of the kudiwaram. He deducted the rent payable to the landholder and the cost of cultivation including labour charges In *Ratnavelu Pillai* v *Varadaraja Pillai*[2] Chandrasekhara Aiyar, J., construed section 7 (*v*) (*c*) as meaning the net income from the land after deducting from the gross yield merely the charges incurred for cultivation and labour He considered that the plaintiff in such a case as this was not entitled to make any deduction in respect of the melwaram

The Subordinate Judge directed the plaintiff to calculate the net profits in accordance with the judgment in *Ratnavelu Pillai* v *Varadaraja Pillai*[2] and pay the deficit Court-fee within a certain time. As this was not done he dismissed the suit The plaintiff appealed to the District Judge, who agreed with the Subordinate Judge, but at the same time allowed a further deduction to be made in respect of expenses. The appeal is from the judgment of the District Judge In the first place this appeal came before Rajamannar, J, who referred it to a Bench for decision as he disagreed with the opinion of Chandrasekhara Aiyar, J

In our Judgment *Ratnavelu Pillai* v *Varadaraja Pillai*,[2] was wrongly decided. When construing the words "net profits" the Court has to have regard to the subject-matter of the suit, here the kudiwaram right The plaintiff is merely entitled to the the kudiwaram, and the value of that right can only be arrived after deducting

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1. (1934) I.L R 58 Mad 1051 68 M.L J. 755 2. (1942) 1 M.L J. 569

what he has to pay to the landholder by way of rent and, of course, the expenses incurred by him in cultivating the land The Judgment of Venkatasubba Rao, J, in *Maroof* v *Ayyakannu Naicker*[1] which had reference to Court-fee payable under section 7 (*v*) (*d*) of the Act is very much in point We may add that the learned Government Pleader on behalf of the Government accepts the contention of the plaintiff

The appeal will be allowed and the suit will be remanded to the Subordinate Judge for decision on the merits after collecting any extra Court-fee which may be payable on the basis indicated in this judgment The Subordinate Judge will fix the time within which the extra Court-fee, if any, is to be paid The costs of the appeal will be made costs in the suit

B V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE PATANJALI SASTRI AND MR JUSTICE SHAHABUDDIN

Kaza Ramakotayya and others . *Appellants**

v.

Nimmagadda Sitharamaswami, minor by mother and guardian Mahalakshmamma and others *Respondents*

Limitation Act (IX of 1908), section 5—Applicability—Application for a final decree under Order 34, rule 5 of Civil Procedure Code

Section 5 of the Limitation Act is not applicable to an application for a final decree under Order 34, rule 5 of the Civil Procedure Code Hence a Court has no power to condone the delay in filing such an application

Appeal against the final decree of the Court of the Subordinate Judge, Masulipatam, dated 11th February, 1944, in I A No. 822 of 1943 in O S No 73 of 1936.

A Sambasiva Rao for Appellants

P. Satyanarayana Rao for Respondents

The Judgment of the Court was delivered by

Patanjali Sastri, J—This appeal arises out of proceedings for the passing of a final decree in a mortgage suit The preliminary decree was passed on the 23rd December, 1937, and time for redemption was granted till the 23rd June, 1938. The application for final decree—I A No 822 of 1943—was filed on 9th September, 1942, that is to say, more than three years after the time for redemption expired along with an application, I A No. 1193 of 1943, to excuse the delay in filing the former application It was alleged that some of the defendants were representing that they would settle and pay the amount due and that the next friend of the plaintiff being a woman devoid of worldly knowledge, believed their words and was under the impression that there would be no bar of limitation, as the decree was in the name of a minor The learned Subordinate Judge accepting these grounds condoned the delay, and overruling the objections raised in I A. No. 822 of 1943, passed the final decree The defendants 4, 6 and 8 have preferred this appeal

The appellants contend that the Court below had no power to condone the delay in filing the application for final decree, pointing out that section 5 of the Limitation Act is not applicable to such applications The contention is well-founded and must be upheld. The section says·

"Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable (by or under any enactment) for the time being in force, may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period"

Our attention has not been called to any enactment making this section applicable to applications for final decrees under Order 34, rule 5 of the Code of Civil Procedure. Mr. Satyanarayana Rao for the respondent has sought to support the order of the

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1 (1934) 68 M L J 755 I L R 58 Mad 1051

* Appeal No 361 of 1944 17th December, 1945.

lower Court by referring to *Pulinchandra* v *Muzaffer*,[1] and *Govind Naick Gurunath Naik* v *Basavannawa Parutappa*[2] In the former case it was held that where the next friend of a minor plaintiff died after the preliminary decree was passed and no new next friend was appointed, the proceedings in the suit must be deemed to have remained in abeyance under Order 32, rule 10 of the Code of Civil Procedure until the appointment of a next friend in the place of the one who was dead, and that, therefore, the right to apply for the final decree "accrued" to the plaintiff on his attaining majority up till which time the suit was to be deemed as a pending proceeding The Bombay case referred to also proceeded on similar facts, though the learned Judges rested their decision on a slightly different ground, *viz*, that the right to apply for a final decree was "suspended" during the period in which the suit was stayed, while expressing a doubt as to whether it was correct to hold that a fresh cause of action arose to the minor on attaining majority However that may be, those decisions have no application to the facts here The next friend could have filed the application for a final decree within the time limited by the law, and she not having done so, her application, I A No. 822 of 1943, was clearly barred by limitation

The appeal is accordingly allowed with costs here and in the Court below

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE LAKSHMANA RAO.

Rathnasabapathi Ayyar .. *Appellant**

v.

Subramania Pillai and others .. *Respondents.*

Madras Debt Conciliation Act (XI of 1936), *sections* 4 *and* 25—*Effect of filing a petition under section* 4 *on other proceedings in the Civil Court—Mandatory nature of the provisions of section* 25—*Mortgage decree—Execution—Application by judgment-debtor for stay on the ground of his having applied under section* 4—*Refusal of stay—Sale—Sale without jurisdiction and could be ignored*

The language of section 25 of the Madras Debt Conciliation Act is mandatory. It says in plain terms that a civil Court shall not proceed with a suit or other proceedings when an application under section 4 of the Act has been made, until the Debt Conciliation Board has dismissed the application The act of presenting a petition under section 4 takes away the jurisdiction of the civil Court in execution proceedings until the application has been dismissed

While a mortgage decree was under execution, the judgment-debtor applied for a stay of the proceedings on the ground that he had applied to the Debt Conciliation Board under section 4 of the Act On the strength of the denial of this fact by the decree-holders, the executing Court ordered sale and the property was sold On an application to set aside the sale,

Held, that as the judgment-debtor had filed a petition under section 4 when he applied for stay of proceedings, the Court had no jurisdiction to proceed with the execution until that petition had been dismissed As the sale had been ordered and held in the meantime, when the Court had no jurisdiction to sell the property, its action in so doing must be regarded as a nullity and the sale set aside

Hirannayya v *Thippeswami*, (1938) 2 M L J 1032 followed

Sitarama Reddy v *Bilehal Somappa*, (1943) 1 M L J 402 and *Pagolu Achutaramayya* v *Thimmaraju Ramamma*, (1944) 1 M L J 298 referred to

Appeal under clause 15 of the Letters Patent against the order of Happell, J, dated 2nd March, 1945, in A A. A. O No 142 of 1944, preferred against the order of the Court of the Subordinate Judge, Mayavaram, dated 29th December, 1943, in C M A No 30 of 1943, preferred against the order of the Court of the District Munsiff of Tiruvarur dated 4th September, 1943, in E. A No. 365 of 1943 in O S No 112 of 1936

K S. Desikan for Appellant.

S Swaminathan and *K. Raman* for Respondents.

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1 A I R 1933 Cal 508 2 I L R 1941 Bom. 435

*L P.A No 25 of 1945 6th December, 1945.

The judgment of the Court was delivered by

The Chief Justice—This is an appeal under clause 15 of the Letters Patent. The question involved is one of interpretation of section 25 of the Madras Debt Conciliation Act, 1936 The section reads as follows

"When an application has been made to a Board under section 4, any suit or other proceeding then pending before a Civil Court in respect of any debt for the settlement of which application has been made shall not be proceeded with until the Board has dismissed the application"

The appellant says that the section means that a Court which proceeds to order the sale of the property in execution of a decree when an application has previously been made to a Debt Conciliation Board under section 4 of the Act and is still pending acts without jurisdiction and its order can be ignored

In O S No 112 of 1936 of the Court of the District Munsiff of Tiruvarur the second, third and fourth respondents obtained a mortgage decree against the appellant The decree was made final, whereupon the decree-holders proceeded in execution. On the 31st December, 1942, the judgment-debtor applied for a stay of the proceedings on the ground that he had applied to the Debt Conciliation Board of Negapatam, under section 4 of the Act His application was supported by an affidavit sworn by himself It was opposed by the decree-holders and it was adjourned to the 7th January, 1943, to enable them to file a counter affidavit. On the 7th January, 1943, the hearing was adjourned to the next day when the decree-holders filed an affidavit denying that any application had been made by the judgment-debtor for the conciliation of his debts On the strength of the affidavit of the decree-holders the District Munsiff decided to proceed with the sale, but in his order he pointed out that the decree-holders had to take "the risk." The sale was held on the same day and the mortgaged property was purchased by the first respondent The sale was confirmed in due course.

On the 13th February, 1943, the appellant filed an application in the District Munsiff's Court asking for an order setting aside the sale on the ground that the Court had no jurisdiction to sell the property When the appellant applied for a stay of the execution proceedings on the 31st December, 1942, it was a fact that he had filed an application for the conciliation of his debts. His application of the 13th February, 1943, was based both on the ground that there had been material irregularity in the proclamation and conduct of the sale and on the ground of want of jurisdiction in the Court So far as the petition asked for relief on the ground of material irregularity in the proclamation and the conduct of sale was concerned, it was out of time, but it was within time so far as it concerned the question of jurisdiction, as that contention fell within the decision of the Full Bench of this Court in *Rajagopala Iyer* v, *Ramanujachariar*[1].

The appellant's application to the Debt Conciliation Board was dismissed by the Board on the 31st July, 1943. His application for the setting aside of the sale was heard on the 4th September, 1943 It was dismissed because the District Munsiff considered that there was still no satisfactory proof that the appellant had applied to the Debt Conciliation Board and that no useful purpose would be served by allowing the application because it would merely mean that the property would have to be sold again. The appellant appealed to the Subordinate Judge, who having admitted copies the appellant's petition to the Debt Conciliation Board and the order of dismissing it, allowed the appeal on the ground that the District Munsiff had no jurisdiction to order a sale of the property on the 8th January, 1943, because the petition before the Debt Conciliation Board was still pending The first respondent then appealed to this Court The appeal was heard by Happell, J, who allowed it The learned Judge considered that the order of the District Munsiff directing the sale to be proceeded with could not be said to have been passed without jurisdiction because there was no satisfactory proof before him that the appellant had filed an application under section 4 of the Debt Conciliation Act The appeal is from the judgment of the learned Judge, who granted the necessary certificate

1 (1924) 46 M.L J. 104 · I.L.R. 47 Mad 288 (F B).

The language of section 25 of the Debt Conciliation Act is mandatory. It says in plain terms that a Civil Court shall not proceed with a suit or other proceedings when an application under section 4 has been made, until the Debt Conciliation Board has dismissed the application. The act of presenting a petition under section 4 takes away the jurisdiction of the Civil Court in execution proceedings until the application has been dismissed.

There are three decisions of this Court which conflict with the judgment of Happell, J. Two of them he referred to in his judgment and considered that they were distinguishable The third case, which was decided first in point of time and is a decision of a Division Bench, was not considered by him That case is *Hirannayya* v *Thippeswami*[1] The facts there are analogous to the facts in the present case. During the pendency of the execution proceedings the judgment-debtor brought to the notice of the Court that he had made an application under section 4 of the Debt Conciliation Act, but the Court refused to stay the proceedings without seeing a certified copy of the application. The judgment-debtor's application for postponement of the sale was posted for hearing on the 23rd August, 1937, the date fixed for sale. On that date the District Judge ordered the sale to proceed because there was nothing more than the petitioner's statement to substantiate his petition On the 24th August, the judgment-debtor made another attempt to get the proceedings stayed. This time he filed an affidavit sworn by his vakil to the effect that an application had been made to the Debt Conciliation Board. In these circumstances the District Judge decided to stay further proceedings and granted what he called an interim stay, posting the petition to the 27th August. On that date, after expressing some doubt, about the feasibility of staying the sale after bids had been received, the District Judge thought that the difficulty could be avoided because the highest bidder upto that point was the decree-holder himself and he had consented to allow his bid to await acceptance if the stay should be dissolved thereafter No date was fixed for the resumption of the sale. On the 1st November, the Debt Conciliation Board dismissed the judgment-debtor's application under section 4. On the 3rd November, the District Judge resumed hearing of the petition for execution and passed an order accepting the bid which the decree-holder had made on the 24th August. The appeal was heard by Burn and Stodart, JJ., who held that the District Judge acted without jurisdiction when he allowed the sale to proceed. The basis of the decision was the mandatory nature of the provisions of section 25 of the Debt Conciliation Act.

In *Sitarama Reddy* v *Bilehal Somappa*,[2] Horwill, J , held that once an application has been filed under section 4 of the Debt Conciliation Act the jurisdiction of the Court is *ipso facto* taken away and this opinion was accepted by Kuppuswami Ayyar, J., in *Pagolu Achutaramayya* v *Thimmaraju Ramamma.*[3] These are the two cases which Happell, J , considered distinguishable. With great respect we do not consider that they are distinguishable They certainly have direct bearing on the question of the jurisdiction of a Court to execute a decree while a petition to the Debt Conciliation Board is pending In any event the decision of the Division Bench in *Hirannayya* v. *Thippeswami*,[1] is directly in point and governs this appeal

We hold that inasmuch as the appellant had before the 31st December, 1942 filed a petition under section 4 of the Debt Conciliation Act, the District Munsiff had no jurisdiction to proceed with the petition for execution until that petition had been dismissed The sale had taken place in the meantime and as the Court had no jurisdiction to sell the property, its action in so doing must be regarded as a nullity It is well settled law that an order or decree passed by a Court without jurisdiction has no validity and can be ignored

The result is that we allow the appeal and restore the order of the Subordinate Judge There will, however, be no order as to costs in this Court or before Happell, J.

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1 (1938) 2 M L J 1032

2 (1943) 1 M L.J 402.

3 (1944) 1 M.L J 298

Although the appellant has succeeded in this Court we consider that his object in filing this appeal has been merely to delay the decreeholders obtaining their money. It is most regrettable that he should be so obstructive, but as the law is on his side we must set aside the order of Happell, J but without costs.

V.S. *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE LAKSHMANA RAO.

Manda Mahalakshmamma .. *Appellant**

v.

Mantravadi Suryanarayana Sastri and others .. *Respondents.*

Hindu Law of Inheritance (Amendment) Act (II of 1929)—Act applies only to separate properties of Hindu male dying intestate—Properties which had become a woman's stridhanam*—Succession to such an estate—Applicability of the Act—Law governing*

The Hindu Law of Inheritance (Amendment) Act, 1929, only applies to the separate property of a Hindu male who dies intestate

T, the widow of *S*, received under a compromise decree in a suit between her and *S*'s uncles half of the properties left by her husband *S*, in absolute right On the death of *T* in 1926 hose properties devolved upon *S*'s mother On the latter's death in 1938, the son of the paternal uncle of *S*, claiming as the nearest agnate entitled to the properties which had fallen to *T* sued the sister of *S*, who claimed that she was entitled to those properties in asmuch as the succession was governed by the Hindu Law of Inheritance (Amendment) Act, 1929

Held, that in the circumstances, the properties obtained by *T* could only be regarded as belonging to her in her own right and the Hindu Law of Inheritance (Amendment) Act, 1929 did not apply to the case, as the estate with which the suit was concerned was the *stridhanam* property of that woman The succession to such an estate would be governed by the ordinary rule of Hindu Law

Mt. Charjo v *Dinanath*, A I R (1937) Lah 196 (2) and *Shamrao* v *Raghunandan*, I L R (1939) Bom 228 dissented from

Shakuntalabai v *Court of Wards*, I L R (1942) Nag 629 followed

Appeal against the decree of the Court of the Subordinate Judge, Bapatla in A.S No. 294 of 1940 preferred against the decree of the Court of the District Munsiff, Bapatla in O S. No. 712 of 1938.

V. Govindarajachari for Appellant.

M. S. Ramachandra Rao and *A Sambasiva Rao* for Respondents.

The judgment of the Court was delivered by

The Chief Justice—In this appeal the Court is concerned with the succession to the estate of one Tirupathamma who died on the 14th December, 1926. The following genealogical tree will help in the appreciation of the facts

Mantravadi Papayya

Kristnamma. — Ramayya

Sambayya — Sambayya.

Ramayya's sons: Subbarayudu (died before Seshamma's death); Kristniah (died before Seshamma's death); Neelayya Sastri (died 29-3-1938) — Suryanarayana Sastri (Plaintiff).

Sambayya's son: Venkayya=Seshamma (died on 2-1-1938) — Sambayya=Tirupathamma (d. 3-7-1916) (d 14-12-1926) — An unnamed son (d. 6-10-1916).

Sambayya, Tirupathamma's husband, died on the 3rd July, 1916 being succeeded by his widow and his son. The son died on the 6th October, 1916 On the son's death the properties left by Sambayya devolved upon Tirupathamma. She claimed to be entitled to the estate in her own right under a will alleged to have been left by Sambayya. The validity of this will was disputed and Subbarayudu, Kristniah

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* S.A. No. 1582 of 1944. 2nd January, 1946.

and Neelayya Sastri, the uncles of Sambayya, instituted in the Court of the Subordinate Judge of Guntur, O S No 142 of 1917 for a declaration of its invalidity. On the 20th December, 1918, by consent a decree was passed under which Tirupathamma received in absolute right a half of the properties left by her husband Consequently the properties which she received under this decree became her own *stridhanam*. On Tirupathamma's death the properties devolved upon Sambayya's mother Seshamma, who died on the 2nd January, 1938. Under the Mitakshara law the heir was Neelayya Sastri He died on the 29th March, 1938.

On the 26th October, 1938 Neelayya Sastri's son instituted this suit He claimed to be entitled to the properties which had fallen to Tirupathamma under the compromise decree of the 20th December, 1918 as the heir of his father Neelayya Sastri and as the nearest agnate There were 19 defendants The first defendant was the sister of Sambayya The other defendants were tenants of the properties in suit. The first defendant claimed that she was entitled to the properties because the succession was governed by the Hindu Law of Inheritance (Amendment) Act of 1929 The District Munsiff held that this Act had no application and that the ordinary rule of succession to *stridhanam* properties applied. His decision was upheld by the Subordinate Judge on appeal The first defendant appealed to this Court. As there are two decisions, one of the Lahore High Court and one of the Bombay High Court, which support her contention, the appeal was referred to a Bench by Chandrasekhara Aiyar, J. before whom it came in the first place.

The Hindu Law of Inheritance (Amendment) Act, 1929, only applies to the separate property of a Hindu male who dies intestate. In such a case a son's daughter, daughter's daughter, sister and sister's son is, in the order so specified, entitled to rank in the order of succession next after a father's father and before a father's brother If this Act applied here, as the first defendant maintains it does, she would be entitled to the properties in suit; but it is manifest that the Act does not apply, because the estate with which the suit is concerned is the *stridhanam* property of Tirupathamma It is accepted that the compromise decree of the 20th December, 1918, conferred upon Tirupathamma an absolute right in a half of what her husband had died possessed of. In the circumstances the properties can only be regarded as belonging to Tirupathamma in her own right.

We will now refer to the two decisions relied upon by the first defendant. The first is the judgment of a Judge of the Lahore High Court sitting alone. The case is *Mt Charjo* v *Dinanath*[1], where it was said that in order to ascertain who the heirs of the husband were, the Court must *ex necessitate rei* refer to the law governing succession to the property of the husband in force at the time when succession opened out. The second is the judgment of a Judge of the Bombay High Court, also sitting alone, and delivered in *Shamrao* v. *Raghunandan*[2], where the same reasoning was applied. With great respect we cannot accept the opinion expressed in these cases. Here, as there, it is not a question of deciding who are the heirs of a Hindu male. The question is who are the heirs in respect of properties belonging to a Hindu woman in her own right In the footnote on page 84, of the tenth edition of Mayne on Hindu Law it is pointed out that the decision in *Mt. Charjo* v. *Dinanath*[1] overlooks the express provisions in sub-section (2) of section 1 of the Act which limits the altered order only to the property of a male. In our judgment the correct view of the law was expressed in the judgment of a Bench of the Nagpur High Court in *Shakuntalabai* v. *Court of Wards*[3] As the Act does not apply to this estate, the succession is governed by the ordinary rule of Hindu Law and under this rule the plaintiff is the heir.

We hold that the case was rightly decided by the Courts below and consequently the appeal must be dismissed with costs in favour of the first respondent.

V.S ——— *Appeal dismissed.*

1. A.I R 1937 Lah. 196 (2).
2. I.L.R. 1939 Bom. 228.
3. I.L R. 1942 Nag 629.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE RAJAMANNAR

Batchu Venkatarao *Appellant**

v.

Surneedi Sathiraju and others *Respondents*

Limitation Act (IX of 1908), *Article* 156—*Amendment of decree—Calculation of time for purposes of appeal—Starting point*

Where a decree is amended and the amendment is in regard to a pure arithmetical error, if the amendment is not the reason for the grievance of an appellant against such decree there is clearly no reason for allowing the appellant to calculate limitation from the date of the amendment rather than from the date of the original decree, but if the appellant is not aggrieved by the orginal decree, but is aggrieved by the decree as amended, logically and equitably time for the appeal should run from the date of the decree as amended

Merla Jamkamma v *Sri Inuganti Venkartarajagopal Chinnarao Garu,* (1944) 2 M L J 384 and *Parameshraya* v *Seshagiri Appa,* (1899) I L R 22 Mad 364 (F B) referred to

Viswanathan Chetti v *Ramanathan Chetti,* (1901) I.L R 24 Mad 646 explained

Appeal against the decree of the Court of the Subordinate Judge, Cocanada, in O. S. No. 39 of 1941, dated 20th February, 1942, as amended by its order in I A No. 1362 of 1943, dated 11th January, 1944.

D. Narasaraju for Appellant

G. Balaparameswari Rao for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J—The appellant filed a suit on a mortgage for Rs 3,000 bearing interest at 12-3/8 per cent per annum with a default rate of 12-3/8 per cent compound with annual rests In the plaint the appellant gave up Rs 550 and claimed Rs. 9,000 with subsequent interest The defendants raised pleas under Madras Act IV of 1938 which were negatived The Court accepted the evidence of certain payments made and also reduced the rate of interest to nine per cent simple, treating the transaction as usurious, and gave a decree on that basis for Rs 3,000 with interest at nine per cent from the date of the bond, less the amount of the payments In calculating the amount of the payments an error was made, the total being taken as Rs. 1,800 instead of Rs 3,160 The preliminary decree is dated 20th February, 1942, and one year was allowed for redemption There was no appeal and a final decree was passed. In the course of the execution the defendants discovered the error in calculating the amount of payments and they filed an amendment petition which was allowed, the decree being amended so as to give credit for the full amount of payments, Rs. 3,160. It is against this amended decree that the present appeal is preferred.

In appeal Mr. Narasaraju has conceded that the figures of payments adopted in the original decree were wrong and that the error which was corrected in the amendment was a purely arithmetical error He has, however, contended that the amendment should not have been made because there was another error which neutralises the effect of the arithmetical error and to the extent of the amendment he has contended that the original decision of the lower Court was wrong His contention is that there was no basis for the lower Court's decision that the rate of interest was usurious and that anyhow the reduction in the rate of interest should not have been so drastic as it was Against this contention the respondents urge that the appeal is barred by limitation, having been preferred more than two years after the original decree They also contend that there is another error in the lower Court's original decree which neutralises the effect of the error pointed out by the appellant as neutralising of the effect of the arithmetical error which was corrected in the amendment.

The question of limitation is not really of great importance in this case for if we were of opinion that time had to be calculated from the date of the original decree, we could in a proper case excuse delay under section 5 of the Limitation Act. We do, however, wish to express our opinion that in a case of this kind where the appellant

*Appeal No 427 of 1944. 23rd November, 1945.

does not contest the correctness of the original decree except in so far as he attacks the reduction of the decree by the amendment, time should properly run from the date of the amended decree and not the date of the original decree. In *Merla Janikamma* v *Sri Inuganti Venkatarajagopala Chinnarao Garu*[1], to which one of us was a party, it was held that where the appellant was not aggrieved by the original decree but was aggrieved by the amendment, the calculation of limitation for the appeal should be from the date of the amended decree and not from the date of the original decree That is the view suggested in the judgment of Subramania Aiyar, J., which was under appeal in the Full Bench decision in *Parameshraya* v. *Seshagiri Appa*,[2] and it seems to us to be the correct view. If the amendment is not the reason for the grievance of the appellant, there is clearly no reason for allowing the appellant to calculate limitation from the date of the amendment rather than from the date of the original decree ; but if the appellant was not aggrieved by the original decree, but is aggrieved by the decree as amended, logically and equitably time for the appeal should run from the date of the decree as amended. The decision in *Viswanathan Chetti* v *Ramanathan Chetti*[3], which is frequently quoted as authority for the view that in all cases an application under section 5 of the Limitation Act is necessary, where the appellant is aggrieved by the amended decree and files his appeal in consequence when it would be barred if limitation starts from the date of the original decree, seems to us not to be an authority for the proposition. The learned Judges in that case were dealing with an application to revise an order amending a decree and in rejecting the application, they merely observe that it is open to the petitioner relying on section 5 of the Limitation Act to appeal against the decree as amended, notwithstanding the expiration of one month from the date when the decree was passed. That is really nothing more than an observation which does not consider any contention that limitation for an appeal as against the amended decree must be reckoned from the date of the amendment in cases in which the appellant had no grievance against the decree before it was amended. We are of the opinion that the present appeal, which is preferred only against the decree as amended, complaining of the reduction in that decree by reason of the amendment, is within time

Turning to the merits of the appeal, we doubt whether it is desirable to attempt to work out the result of the various neutralising errors which are alleged to have been committed in the original decree. Clearly there was an arithmetical error in calculating the amount of payments The question whether there was an error in the application of the Usurious Loans Act is to a large extent a matter of opinion. The learned Judge might have stated at more length his reason for reducing the claim as drastically as he has done ; but it is not a reduction which is obviously illegal. On the other hand there does seem to have been an error in refusing relief under Madras Act IV of 1938 to the sons of the first defendant, because it appears from the judgment that the first defendant, the father, was divided from his own brother so that on the decision, section 6 of Madras Act IV of 1938 would not operate to make the disqualification of the father from claiming relief exclude the sons from a similar relief. No doubt on a correct working out of the relief under Madras Act IV of 1938 the father would have to be treated as a non-agriculturist and the sons as agriculturists : but the father's share would only be one-fourth of the property. In these circumstances we do not feel disposed to go into the precise effect of these conflicting errors in order to ascertain whether on the balance there is any error to the detriment of the plaintiff which would neutralise the correction of the admitted arithmetical error of the learned Judge in calculating the payments. In this view we dismiss the appeal with costs.

V P.S. ——— *Appeal dismissed.*

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1 (1944) 2 M L J 384
2. (1899) I L.R 22 Mad. 364 (F B)
3. (1901) I.L R. 24 Mad 646.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE SOMAYYA AND MR. JUSTICE YAHYA ALI.

Arikapudi Balakotayya and others . *Appellants**

v.

Yadlapalli Nagayya and another . *Respondents.*

Civil Procedure Code (V of 1908), section 11—Applicability—Suit to establish hereditary trusteeship in temple—Application to District Court under section 84 (2), Madras Hindu Religious Endowments Act also filed—Dismissal of suit—Appeal—Dismissal of application by District Court during pendency—Appellate Court whether can give effect to rule of res judicata

The doctrine of *res judicata* is not confined to decision in a suit and it applies even to decisions in proceedings which are not suits Thus the decision of the District Court under section 84 (2) of the Madras Hindu Religious Endowments Act, upholding the order of the Board under section 84 (1) of the said Act operates as *res judicata* in a subsequent suit by the defeated trustee.

The suit temple was declared by the Endowments Board to be a non-excepted temple on an application filed under section 84 (1) of the Madras Hindu Religious Endowments Act It was urged in the application that the applicant and his forefathers were the hereditary trustees of the temple This was negatived and the petition was dismissed The applicants then filed a suit, out of which the present appeal arose, for a declaration that the office of trusteeship was hereditary in their family, and that they and their predecessors were also hereditary trustees of the temple They also filed an application under section 84 (2) of the Act in the District Court The Applicants, being unsuccessful in the suit, preferred an appeal to the High Court It appeared that after the disposal of the suit by the lower Court the petition filed in the District Court came on for hearing and it was held therein that the appellants were not the hereditary trustees The later decision having been brought to the notice of the High Court at the time of the disposal of the appeal,

Held, that the proceeding under section 84 (2) of the Act was in the nature of a suit and not a mere summary proceeding and that the decision of the District Judge in the petition operated as *res judicata* in the suit between the same parties

Appeal against the decree of the Court of the Subordinate Judge of Guntur, in O.S No. 30 of 1942

Ch. Raghava Rao, *N. Subramaniam*, *N. Sitarama Sastri* and *Mrs. Durga Bai* for Appellants.

K. Subba Rao for Respondents

The judgment of the Court was delivered by

SOMAYYA, J —The main question involved in this appeal is whether the decision of the District Court under section 84 clause (2) upholding the order of the Madras Hindu Religious Endowments Board under section 84 (1) of the Madras Hindu Religious Endowments Act, II of 1927, (hereinafter referred to as the Act) operates as *res judicata* in a subsequent suit by the defeated trustee. The temple in question was declared by the Endowments Board to be a non-excepted temple on an application filed under section 84 (1) of the Act. It was urged in that application that the applicant and his forefathers were hereditary trustees of the temple This was negatived and the petition was dismissed. The applicants then filed the suit out of which the present appeal arises for a declaration that the office of trusteeship was hereditary in their family, and that they and their precedecessors were the hereditary trustees of the temple They also filed an application under section 84 (2) of the Act in the District Court of Guntur (O P. No 96 of 1942) In the present suit the Court held, among other things, that the plaintiffs did not prove that they were the hereditary trustees and hence this appeal.

After the disposal of the suit by the lower Court, the petition (O P. No. 96 of 1942) filed in the District Court came on for hearing, the matter was enquired into and the District Court decided that the petitioners before it did not prove that they were the hereditary trustees of the temple. We heard Mrs. Durga Bai who addressed a very forcible argument on the facts and were of the opinion that on the merits the appellants had a good case. Then it was brought to our notice that O.P. No. 96 of 1942 which was filed in the District Court of Guntur and which was pending when the judgment under appeal was rendered, was subsequently tried on the merits and a decision adverse to the appellants was given by that Court. We were also told that the matter was brought up in revision to this Court and that

*Appeal No. 97 of 1944. 21st August, 1945.

this Court declined to interfere It was therefore urged that apart from the correctness of the decision of the lower Court on the merits, the appellants were precluded from urging their rights by reason of the adverse decision in the original petition We called for the order of the District Judge in the said original petition and we have allowed that to be exhibited in the appeal If before an appeal is heard, there is another decision which has become final and which operates as *res judicata* on the question at issue in the appeal, the appellate Court ought not to refuse to allow the later judgment to be filed Once it is brought to its notice that there is such a judgment it is the duty of the appellate Court to allow it to be filed in order to avoid conflicting judgments and further complications This position is not controverted and we have therefore to see whether the judgment of the District Court in O.P. No 96 of 1942 precludes us from entertaining the claim of the appellants

The solution of the question depends upon the nature of a proceeding under section 84 (2) of the Act It is undoubtedly the law that the doctrine of *res judicata* is not confined to decision in a suit and that the doctrine applies even to decisions rendered in proceedings which are not suits But how far a decision which is rendered in an original proceeding will bind the parties depends upon other considerations It is here that Courts have had considerable difficulty in deciding whether the decision rendered in such a proceeding operates as *res judicata.*

We may begin the discussion of this question with the decision of the Judicial Committee in *Ramachandra Rao* v *Ramachandra Rao* [1] A reference was made by the Collector under section 31 (2) (now section 30) of the Land Acquisition Act, I of 1894 There was no dispute as to the amount of the compensation awarded by the Collector, but there was a dispute as to who was entitled to that amount There were rival claimants and hence the matter was referred under section 31, sub-section (2) to the Court The Court held in favour of one of the claimants. The matter was taken up on appeal to the High Court and the High Court gave its own decision The matter was not carried further. Subsequently disputes arose between the same parties as to who was entitled to some property of considerable value The question was whether the decision rendered by the High Court in the land acquisition proceedings operated as *res judicata* In the prior proceeding as well as in the later suit, the question was whether under a settlement deed of 1858 one Tulaji Bai took only a life interest That question was decided in one way by the High Court in the procedings under the Land Acquisition Act. In the subsequent suit the decision of the High Court was pleaded as *res judicata.* The application of the doctrine was resisted on the ground that the decision set up in bar was rendered not in a suit but only in an Original Petition and that the decision did not operate as *res judicata* The Judicial Committee pointed out that, where the proceedings under the Land Acquisition Act had proceeded beyond the stage of the fixing of the amount and there was a dispute between two rival claimants to the amount awarded, the dispute related to title to property and that the Court acting on a reference under section 31 (2) decided the question of title between the parties. That being so they held that the decision though rendered in an original proceeding and not in a suit nevertheless operated as *res judicata.* They pointed out that the decision of the High Court in the previous case was not appealed against, as it might have been, and that not having been appealed against, the decision became final On page 86 we find this—

"The award as constituted by Statute is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the collector has information, meaning thereby people whose interests are not in dispute, but from the moment when the sum has been deposited in Court under section 31, sub-section (2) the function of the award has ceased , and that all that is left is a dispute between interested people as to the extent of their interest Such dispute forms no part of the award, and it would indeed be strange if a controversy between two people as to the nature of their respective interest in a piece of land should enjoy certain rights of appeal which would be wholly taken away when the piece of land was represented by a sum of money paid into Court. There has in the present case

1. (1922) 43 M.L.J. 78 (86) : L.R. 49 I.A. 129 : I.L.R. 45 Mad. 320 (P.C.)

been a clear decision upon the very point now in dispute, which cannot be re-opened The High Court appear only to have regarded the matter as concluded to the extent of the compensation money, but that is not the true view of what occurred, for as pointed out in *Badar Bee* v *Habib Merican Noordin*,[1] it is not competent for the Court, in the case of the same question arising between the parties, to review a previous decision, no longer open to appeal, given by another Court having jurisdiction to try the second case If the decision was wrong, it ought to have been appealed from in due time. Nor in such circumstances can the interested parties be heard to say that the value of the subject matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it If such a plea were admissible, there would be no finality in litigation The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute "

Dealing with the argument that the previous decision was not rendered in a suit they said this—

" It has been suggested that the decision was not in a former suit, but whether this were so or not makes no difference, for it has been recently pointed out by this Board in *Hook* v *Administrator-General of Bengal*,[2] that the principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of the Code in this respect."

This decision lays down definitely that even though a decision may be given in a proceeding which is not a suit, it may still operate as *res judicata* if substantial rights of parties are determined. No doubt, it is true as pointed out by Mr Raghava Rao, the learned advocate for the appellants, that the decision of the High Court in the previous proceedings was appealable and that the Judicial Committee laid stress on the fact that the decision of the High Court though appealable was not in fact appealed against and had been allowed to become final. But, as has been pointed out repeatedly, the question whether a decision operates as *res judicata* does not depend upon the appealability of the decision A decision may not be appealable and still it may operate as *res judicata* If this decision had stood alone, the question would not have presented much difficulty But there is another decision of the Judicial Committee in *Bhagwan Din* v *Gir Harsaroop*[3] In that case proceedings were started under Act XIV of 1920 for certain reliefs provided under that Act ; and one question was whether there was a public religious trust The question was determined by the District Court and an order passed. Later on there was a regular suit in which same points were raised and the question was whether the decision rendered in the O. P. under Act XIV of 1920 operated as *res judicata.* The Judicial Committee held that it did not They laid down that the decision or order under Act XIV of 1920 was given in a summary proceeding, that the order was by express enactment not appealable, that no finality was attached by the Legislature in express terms to the order and that therefore the decision under that Act did not operate as *res judicata* so as to preclude the parties from re-agitating the question in a subsequent suit In later decisions, the difficulty has been whether a particular case comes within the decision of the Judicial Committee in *Ramachandra Rao's case*[4], or whether it falls under the later decision in *Bhagwan Din* v. *Gir Harsaroop*[3]

Very recently a similar question arose under section 44 of the Madras Hindu Religious Endowments Act which is the very Act with which we are in this appeal concerned Where some property is charged with the payment of an amount for peforming certain services in a temple, the trustee may file an application before the Court, which for this purpose is the District Court, and the Court may pass an order directing the person in possession of the property to pay the amount which it may find is charged on the property in favour of the temple and this decision may be enforced as if it were a decree of Court The District Judge passed an order on an application filed under section 44 in favour of the temple trustee. The facts were these : One Muruga Padayachi left a will charging some of his properties with payment of certain sums for a temple He died leaving an adopted son and that son denied the validity of the will alleging that at time of his death the testator was a member of an undivided family and that therefore the will was invalid In the application under section 44 of the Act, the District Judge found

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1 (1909) A C. 615 (P C.).
2. (1921) 40 M L J 423 L R 48 I A 187 : I.L.R. 48 Cal. 499 (P C)
3. (1940) 1 M L J. 1 : L R. 67 I A. 1 · I L.R. 15 Luck 1 (P C)
4 (1922) 43 M L J 78 · L.R. 49 I.A. 129 : I L R 45 Mad 320 (P C)

in favour of the temple The respondent who was the testator's adopted son acted in accordance with this decision for some time and then refused to pay over the income of the property to the trustee having made up his mind that he would not recognise the settlement or the will of his father as a valid one. The Chief Justice and Lakshmana Rao, J., held that the order under section 44 of the Act did not operate as *res judicata*—*Amirthalinga Padayachi* v. *Chandrasekhara Padayachi*[1]. The learned Judges pointed out that the case before them did not fall within the earlier decision of the Judicial Committee in *Ramachandra Rao's case*[2] and that it was governed by the later decision in *Bhagwan Din* v. *Gir Harsaroop*[3] Then they extracted the following passage from the judgment in the later case of *Bhagwan Din* v. *Gir Harsaroop*[3].

> "The decision of the District Judge under the Act of 1920—a decision from which by section 12 there is no appeal—is a decision in a summary proceeding which is not a suit nor of the same character as a suit, that it has not been made final by any provision in the Act, and that the doctrine of *res judicata* does not apply so as to bar a regular suit even in the case of a person who was a party to the proceedings under the Act."

Then they proceeded to say this :

> "The position under the Madras Hindu Religious Endowments Act is exactly the same There is no appeal from an order under section 44, but the Act does not say that the order is final"

Before proceeding further we may point out that in *Sri Kothandaramaswami Temple* v. *Veezhinatha Ayyar*,[4] this Court held that section 44 of the Act does not preclude a trustee from filing a suit in the ordinary civil Court for recovery of sums charged in favour of a temple over properties in the possession of another person, and that the remedy provided by section 44 is not the only remedy open The question in that case was whether the trustee of an institution is bound to proceed under section 44 by a petition to the Court in order to recover the amount which is payable for certain services in a temple charged on the property in the possession of another. This Court pointed out that the jurisdiction of the civil Court was not expressly ousted either by express language or by necessary implication and that the remedy provided by section 44 is an additional right given by the Act and that the common law right of proceeding by a suit was not taken away If without proceeding under section 84 clause (1) of the Act, the appellants had in the first instance filed a suit for a declaration that they are the hereditary trustees, the civil Courts would be bound to entertain the suit The fact that there is a remedy provided by way of an application to the Endowments Board under section 84 (1) would not stand in their way. In Appeal No. 121 of 1942 (unreported) this Court had to consider this question at some length. While pointing out the various anomalies created by the Act on the question, this Court held that a suit would lie if there was no proceeding under section 84 (1).

We are here directly concerned with the question whether when there is an application to the Board under section 84 (1) followed by an application under section 84 (2) to the District Court and there is a decision by the District Court, the decision of the District Court is binding on the parties in a subsequent suit. In other words, the question is whether proceedings under section 84 (2) are summary in nature so as to attract the application of the rule laid by the Judicial Committee in the *Lucknow case*[3] For the appellants Mr. Raghava Rao contends that there is no appeal against the order of the District Judge under section 84 (2) and that that has been decided by the Full Bench of this Court in *Rajagopala Chetty* v *H. R E. Board, Madras*,[5] which was followed later by Wadsworth and Patanjali Sastri, JJ. in *Bashyakar* v. *H R E. Board, Madras*[6]. He contends further that there is no statutory finality attached by the Legislature to the decision of the District Judge under section 84 (2) He draws our attention to the wording of the section which says that subject to the decision of the District Judge the order of the Board is final.

1 (1945) 1 M L J 357
2 (1922) 43 M L J 78 · 49 I A 129 I L.R 45 Mad 320 (P C.).
3 (1940) 1 M L J 1 · L.R 67 I A. 1 I.L.R. 15 Luck. 1 (P.C)
4 (1945) 1 M.L J. 65 I L R (1945) Mad 553
5 (1933) 66 M L.J. 43 . I.L.R. 57 Mad. 271 (F B.)
6 (1941) 1 M.L.J. 250: I.L.R. (1941) Mad. 559.

He also points out the difference in the language employed by the Legislature in the various sections of this very Act In one set of sections the language used is that the order of the Court is final and in another set of sections the language used is that the order of the Board or the Committee is final subject to the decision by the Court. If no finality is attached to the order of the District Judge, then, it is said that the case resembles the *Lucknow case*[1] rather than *Ramachandra Rao's case*[2]. On the other hand Mr. K. Subba Rao, the learned advocate for the respondents, contends that even if the matter had rested with a decision under section 84 (1) by the Board, the parties would be bound and that it would not be open to the appellants to raise this question in the present suit He next contends that the matter having been taken to the Court under section 84 (2) and there having been a decision by the District Court, the doctrine of *res judicata* applies as the decision set up in bar is that of an ordinary civil Court He urges that a proceeding under section 84 (2) in the District Court though started as an Original Petition has all the characteristics of a suit Evidence has to be taken and the Court cannot refuse to take evidence. The question has to be decided on the materials placed before the Court and the Court is not dealing with the matter by way of appeal from the order of the Board but is dealing with an original proceeding started in that Court. He further contends that despite the difference of the language used in the various sections of the Act relied on by the appellants, the effect is the same and that the finality attached by the Legislature under section 84 (2) is really attached to the decision of the District Court as well The further contention is that even if the finality attached by the Legislature is only to the order of the Board and not to the decision of the District Court, the decision would nevertheless operate as *res judicata* as the proceeding is one in the nature of a suit as contemplated by the Judicial Committee in the *Lucknow case*[1]. It is urged that the rights of the parties have been investigated on evidence taken and that the position is therefore analogous to that which arose in *Ramachandra Rao's case*[2]. Dealing with the *Lucknow case*[1], it is pointed out that there are very many indications in that Act, which show that the whole proceeding is of a very summary nature, that it is not even obligatory on the Court dealing with an application under Act XIV of 1920 to take evidence and that further it is expressly provided in the Act that there was to be no right of appeal. We have now to decide which of these contentions is right If the matter had rested with an order of the Board under section 84 (1) we should have hesitated very much before agreeing with the learned advocate for the respondent that that order would preclude the determination of the question raised in this appeal The Board is a special tribunal constituted by the local Legislature It is given jurisdiction only in matters which are expressly provided for by the Act One of the matters on which jurisdiction is given to the Board is to decide whether an institution is a math or a temple as defined in the Act or whether a temple is an excepted temple Leaving out the other questions with which we are not concerned, the Board has jurisdiction to decide whether a temple is an excepted temple or not No doubt in many cases, the decision of the question whether a temple is an excepted temple or not will depend upon the question whether the trustee of the temple is a hereditary trustee where there is a single trustee and in cases where there are more trustees than one whether the trusteeship of all is hereditary But the Board is not empowered to decide the question whether a person is a hereditary trustee of a temple or not. That may no doubt arise incidentally as one of the questions to be decided or it may in some cases be even the main question to the decided in order to determine whether a temple is an excepted temple or not But nevertheless the Board being a special tribunal created by the Legislature with a limited jurisdiction, the Board's decision on those matters only over which the Board is given exclusive jurisdiction will operate as *res judicata* . It is true, as Mr Subba Rao has pointed out, that where there is an order under section 84 (1) that a temple is or is not an excepted temple, it is not open to the parties to file a civil suit to challenge the decision of the Board but must proceed under section 84 (2) See *Ishwarananda*

1 (1940) 1 M L J. 1 : L R. 67 I.A. 1 · I.L.R 15 Luck 1 (P.C.)

2 (1922) 43 M L J 78 : L.R 49 I.A. 129 : I.L.R. 45 Mad. 320 (P.C.).

Bharatiswami v. *Commissioner, H. R. E. Board*[1], and *Ishwarananda Bharatiswami* v. *H R E Board, Madras*[2] But that is far from saying that the ground of the decision or the finding on a question on which the decision of the Board is based is *res judicata* Mr. Subba Rao, relies on the decision of Wallis, C J., in *Muthammal* v. *Secretary of State for India*[3], in this connection but the authority of that decision is very much shaken as pointed out in the recent Full Bench judgment in *Siva Prasad* v *Narasimhamurthy*[4] It is unnecessary to go further into this matter as we are of opinion that the order of the District Court under section 84 (2) operates as *res judicata* Before proceeding further we must examine the provisions of the Charitable and Religious Trusts Act, XIV of 1920 in order to understand the judgment of the Judicial Committee in *Bhagwan Din* v *Gir Harsaroop*[5]. As the preamble states, the Act was passed to provide facilities for obtaining information regarding trusts created for public purposes of a charitable or religious nature and in order to enable the trustees of the trusts to obtain directions of the Court on certain matters. The first part of the Act provides for enabling parties to get information regarding the trusts created for public purposes of a charitable or religious nature Under section 3 a person having an interest in such a trust may apply by petition to the Court for obtaining any of the directions mentioned in sub-clauses (1) and (2), *i e*, directing the trustees to furnish particulars as to the nature and object of the trust and of the value, condition, management and application of the subject-matter of the trust and of the income belonging to the trust and also directing the accounts of the trust to be examined The petition is to be verified in the manner provided by the Civil Procedure Code for verifying plaints On receiving such an application, the Court may take such evidence and make such enquiry as it may consider necessary and if after taking such evidence and making such enquiry, the Court is of opinion that the petitioner has an interest in the trust, it shall fix a date for hearing and cause notices to be served on the opposite side On the day fixed for the hearing of the petition, the Court shall proceed to hear the petitioner and the trustee, if he appears and any other person who has appeared in consequence of the notice or whom it considers ought to be heard and *shall make such further enquiries, if any, as it thinks fit.* The trustee may, and if so required by the Court, shall,at the time of the first hearing present a written statement And sub-clause (3) of section 5 says that if any person appears at the hearing of the petition and either denies the existence of the trust or denies that it is a trust to which Act applies and undertakes to institute within three months a suit for a declaration to that effect, the Court shall stay the proceedings. If no such undertaking is given or if no suit is instituted, the Court shall itself decide the question and on completion of the enquiry, the Court may either dismiss the petition or pass such other order as it thinks fit The order that it may pass is confined necessarily to the reliefs mentioned in section 3 If the trustee fails to comply with the directions given under section 5, the consequence is that in a suit which may be filed under section 92, Civil Procedure Code, his failure to comply with the order shall be deemed to be a breach of trust. Section 12 provides that no appeal shall lie from any order passed under the Act In the case of *Bhagwan Din* v. *Gir Harsaroop*[5], the District Judge was moved by a petition under section 3 of the Act and the District Judge made an order under section 5, clause (4) holding that the institution was a public religious trust. The order under section 5 (4) was not complied with by the trustee A suit was filed under section 92 of the Code of Civil Procedure for removing the trustee and for other reliefs and the question was whether the decision of the District Judge under section 5 (4) of Act XIV of 1920 that the institution was a public religious trust operated as *res judicata.* The Judicial Committee held that orders under Act XIV of 1920 were of a summary nature and that therefore the decision did not operate as *res judicata* They pointed out, among other things, that under section 12 no appeal lay against the order, that there was no finality expressly attached to the order by the Act itself, that the

1. (1931) 61 M L J 117 I L R 54 Mad 928
2. (1932) 63 M L J 254 I L R 56 Mad 40
3. (1916) 27 M L J 529 I L R 39 Mad 1202.
4. (1940) 1 M L J 124 : I.L R (1940) Mad. 501 (F B)
5. (1940) 1 M L J 1 L.R. 67 I.A 1. I.L.R. 15 Luck. 1 (P.C.)

Court was bound to stay the hearing of the petition if the party interested undertook to file a suit as provided under section 5 and reference was also made to the provisions of the Act that the District Judge was to make such enquiry as he thought fit. In the opinion of the Judicial Committee all these indicated that the order was a summary one. The following passage gives the basis of the judgment:

"It is readily intelligible that the District Judge should be required to stay proceedings under the Act in any case in which the person against whom they have been taken is willing to bring a suit. But it would be both drastic and anomalous to provide that a person in possession, if not willing to bring a suit to establish his own title affirmatively must be content to abide without right of appeal by the decision of the District Judge in a proceeding of this character. The terms of section 6 of the Act are intended, in their Lordships' view to define the consequences of such an order as was made in this case by the District Judge on 1st October, 1930, but the words "If a trustee without reasonable excuse fails to comply" cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant to a suit under section 92 of the Code."

In another passage, the Judicial Committee said this:

"The decision of the District Judge under the Act of 1920—a decision from which by section 12 there is no appeal—is a decision in a summary proceeding which is not a suit nor of the same character as a suit: that it has not been made final by any provision in the Act, and that the doctrine of *res judicata* does not apply so as to bar a regular suit even in the case of a person who was a party to the proceedings under the Act. The existence of public trust is the foundation of the proceedings authorised by section 3 of the Act, *Prima facie* while the District Judge may have to come to a decision upon this point in order to satisfy himself on the question of his own jurisdiction, he cannot by an erroneous decision thereon give himself jurisdiction."

The provision that on an undertaking that a suit would be filed, the District Court hearing the petition under the Act was bound to stay the hearing of the petition was taken as a strong indication that the whole proceeding was a summary one. The declared object of the Legislature in passing the Act was only to provide facilities for the obtaining of information in the case of such trusts. The prohibition of an appeal and the absence of any provision attaching finality to the decision were all considered as material in coming to the conclusion that the whole proceeding was a summary one.

Turning to the decision in *Ramachandra Rao* v. *Ramachandra Rao*[1], when the stage of a reference under section 31 (now section 30) is reached, there are 2 or 3 rival claimants all claiming title to the property which was acquired and therefore to the amount which was adjudged as a fair compensation by the Collector. As pointed out by the Judicial Committee in that case, substantial rights of the parties to properties acquired are determined by the proceeding under section 31 on a reference made by the Collector. In the opinion of the Board there was also an appeal against the order which was passed by the High Court on appeal from the decision of the District Judge or Subordinate Judge.

In a proceeding under section 84 (2) of the Madras Hindu Religious Endowments Act, the District Court is bound to take evidence and cannot act on the evidence recorded by the Board. The Court is to act upon the materials placed before it by the parties. In *Sri Ishwarananda Bharatiswami* v. *The Board of Commissioners for Hindu Religious Endowments, Madras*[2], Reilly and Anantakrishna Ayyar, JJ., dealt with this question and pointed out that in an application under section 84 clause (2), the Court is not an appellate or revisional tribunal, that the application is one to which the ordinary procedure of the Code of Civil Procedure applies and that the parties have a right to produce such evidence as they think fit. The question has been very elaborately dealt with by Anantakrishna Ayyar, J. As the learned Judge has pointed out, a proceeding under section 84, clause (2) has been characterised by a Full Bench of this Court as being analogous to a regular suit. In *Damodaran* v. *H. R. E. Board, Madras*[3], referring to an application under section 84 (2), the learned Judges said this:

"These applications are analogous to a regular suit filed by an unsuccessful claimant."

We are of opinion that proceedings under section 84 (2) cannot be said to be a summary proceeding even though there may be no right of appeal. The question

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1. (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.).
2. (1932) 63 M.L.J. 254: I.L.R. 56 Mad. 40.
3. (1930) 58 M.L.J. 494: I.L.R. 53 Mad. 266 (F.B.)

whether there is a right of appeal against an order under section 84 (2) is a very vexed question on which there is much room for controversy. The question was considered by a Full Bench of this Court in *Rajagopala Chettiar* v. *H. R. E. Board, Madras*[1], but the entire reasoning of the Judges who held that there was no right of appeal is based upon the consideration that a right of appeal must be given by a statute, that the Civil Procedure Code provides only for appeals against decrees and against certain orders which are expressly stated to be appealable, that a decree is one passed in a suit, that a suit commences with a plaint, that a proceeding under section 84 (2) does not commence with a plaint as defined in the Code and that therefore the proceeding is not a suit and the decision not a decree and hence not appealable. The definition of a decree which the learned Judges took as the basis of their judgment included under the old Civil Procedure Code a decision of a suit or of an appeal. In the Code of 1908 the expression "or an appeal" was omitted. The learned Judges were pressed with the decision of the Judicial Committee in *Ramachandra Rao* v. *Ramachandra Rao*[2], where the Judicial Committee held that a decision of the High Court passed in an appeal from a decision given in an original proceeding under the Land Acquisition Act (and not in a suit) was held to be appealable. Madhavan Nair, J., pointed out that the words "the decision in an appeal" might well be taken to be a decree under the old Code and that it may include a decision in an appeal against an order of the first Court passed in an original petition. His view was that the trial Court's decision may be in suits and in other original proceedings. Against both there may be appeals. Decisions of the appellate Courts in both the cases would be decrees under the definition contained in the old Code. The decision in *Ramachandra Rao's case*[2], related to a proceeding under the old Code. Therefore, the decision of the High Court which was passed in appeal was a decree as defined under the old Code and therefore appealable and the learned Judges pointed out that the decision of the Privy Council in *Ramachandra Rao's case*[2] must be understood to deal only with the case of appealability of a decree of the High Court passed in an appeal and not with the question whether the orders of the trial Court were appealable or not. This reasoning, it would be seen, would lead to this conclusion that if an appellate decision was given in an appeal against the order of the trial Court in a proceeding which was not a suit, it would not be appealable under the new Civil Procedure Code as it no longer contains the provision that a decision passed on an appeal is also a decree. This question came up again before the Judicial Committee in *Bhagwati* v. *Ramkali*[3]. There it was an appellate decision against an order of the lower Court in a proceeding which was not a suit and it was passed after the Civil Procedure Code of 1908. The Judicial Committee held that an appeal lay in such a case also. In *Chikkanna Chettiar* v. *Perumal Chettiar*[4], the question arose whether an appeal lies against an order of the Subordinate Judge on a reference under section 30 of the Land Acquisition Act. This directly raised the question whether even against an order passed on an original petition which was not a suit, an appeal would lie even though there was no express right of appeal given by the Legislature. The Full Bench consisting of Sir Lionel Leach, Chief Justice, King and Krishnaswami Ayyangar, JJ., held that an appeal lay against an order passed on a reference under section 30. The learned Chief Justice delivering the judgment of the Full Bench pointed out that the reasoning of Madhavan Nair, J., in *Rajagopala Chettiar* v. *H. R. E. Board, Madras*[1], to the effect that in *Ramachandra Rao's case*[2], the Privy Council were only considering whether the order of the High Court on appeal constituted a decree and hence appealable was erroneous in view of the pronouncement of the Judicial Committee in the later case of *Bhagwati* v. *Ramkali*[3]. On page 805, we find the following:

"In my opinion all controversy is set at rest by the judgment of the Privy Council in *Bagawati* v. *Ramkali*[3]. The opinion expressed in *Ramachandra Rao* v. *Ramachandra Rao*[2] was there re-affirmed,

1. (1933) 66 M L J 43 I L R 57 Mad 271 (F.B.)
2. (1922) 43 M L J 78 L.R. 49 I.A. 129 I L.R 45 Mad 320 (P C)
3. (1939) 2 M L J 98 L R 66 I A. 145 I L R 1939 All 460 (P C).
4. (1940) 1 M.L J. 732 I L R (1940) Mad 791 (F B)

notwithstanding the alteration made by the present Code in the definition of the word "decree". In the light of the recent pronouncement of the Privy Council *Ramachandra Rao* v *Ramachandra Rao*[1] must be taken to decide that an order, not *merely the order on appeal, but an order determining a reference under section* 18 or *under section* 30 *is to be regarded as a decree and not as an award* It follows that the interpretation of *Ramachandra Rao* v *Ramachandra Rao*[1] given by the Full Bench in *Rajagopala Chettiar* v *H R E Board, Madras*[2], can no longer be regarded as being authoritative (The italics are ours)

Dealing with the argument that there was no right of appeal expressly provided, the learned Judges said this on page 807 .

"The Subordinate Judge who is appointed under section 3 (*d*) of the Land Acquisition Act to decide a dispute with regard to the allocation of compensation money does not constitute a Court of Record but admittedly he does constitute a civil Court and on the strength of the decision in the *National Telephone Company's case*[3], it might reasonably be argued that the proceedings before him are governed by the provisions of the Code of Civil Procedure Support for this argument is to be obtained from the judgment of the Privy Council in *Secretary of State for India* v *Chellikani Rama Rao*[4] There a claimant whose claim was rejected by a forest settlement officer appealed to the District Court under the Madras Forest Act, 1882, which makes no provision for a second appeal and consequently it was contended that there was no right of further appeal Their Lordships refused to accept this contention, holding that when proceedings of this character reach the District Court that Court is appealed to as one of the ordinary Courts of the country with regard to whose procedure, orders and decrees the ordinary rules of the Code of Civil Procedure apply It is not going much further to say that the same principle applies when an Act like the Land Acquisition Act provides for reference of a dispute to the District Court and gives the Provincial Government power to substitute for the District Judge another judicial officer who admittedly decides the dispute 'as a civil Court' The argument that there is here a right of appeal is made all the stronger by the provisions of sections 53 and 54 of the Act. Any controversy, however, is settled by the decisions of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*[1], and *Bagwati* v *Ram Kali*[5]"

The learned Judges therefore held that even though the two decisions referred to dealt with the right of appeal against an appellate decision, they are authorities for the position that an order passed by the trial Court on a reference made by the Collector under the Land Acquisition Act was also appealable We are very much impressed with the argument that the decision of the Full Bench in *Chikkanna Chettiar* v. *Perumal Chettiar*,[6], holding that an appeal lies against the decision of the trial Court in an original proceeding under Land Acquisition Act would apply equally to an order under section 84 (2) of this Act. That the proceeding under section 84 (2) of the Act is commenced by an application and not by a plaint is the main reason why an appeal was refused against an order passed under that section. Under the Land Acquisition Act substantial rights of the parties to property concerned are determined. The proceedings under that Act are not started by a plaint, but only by an order of reference made by the Collector. Still, the order has been held to be an appealable order. When the matter comes before the District Court under section 84 (2) of the Hindu Religious Endowments Act very substantial questions arise for consideration whether an institution is a math or a temple as defined under the Act and whether the temple is an excepted temple. The latter question involves very often the rights of a particular claimant as a hereditary trustee. If for instance an institution is held to be a temple or math as defined under the Act, it is no longer the private property of the claimant and substantial and large interests as to property will be affected by the decision. Similarly the public will suffer in the event of a decision the other way This being so, the decision of the Court under section 84 (2) would, on the reasoning of the Judicial Committee in *Ramachandra Rao* v. *Ramachandra Rao*,[1] and reiterated in *Bhagwati* v. *Ram Kali*[5] and on the interpretation placed on these two decisions in *Chikkanna Chettiar* v. *Perumal Chettiar*[6], be subject to an appeal. If that is so, it cannot possibly be argued that a proceeding under section 84 (2) is only a summary proceeding falling under the category of cases mentioned in and dealt with by the Judicial Committee in *Bhagwan Din* v. *Gir Harsaroop*[7]. Mr. Raghava Rao, the learned advocate for the appellant has brought to our notice a later decision of this Court

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1. (1922) 43 M L J 78 L R. 49 I A. 129. I.L R 45 Mad 320 (P C).
2. (1933) 66 M.L J 43 : I L.R. 57 Mad. 271 (F.B).
3. (1913) A.C 546
4. (1916) 31 M L J 324 : L.R. 43 I.A. 192 : I.L.R. 39 Mad. 617 (P.C.).
5. (1939) 2 M L J 98. L R. 66 I.A. 145 : I.L R. 1939 All. 460 (P.C.)
6. (1940) 1 M L.J 732 I.L.R. (1940) Mad. 791 (F B.).
7. (1940) 1 M L J 1 : L R. 67 I.A. 1 : I.L R. 15 Luck. 1 (P.C.).

in *Bashyakar* v *H. R. E Board, Madras*[1], where this Court following the decision in *Rajagopala Chettiar* v. *H R E Board, Madras*[2], held that no appeal lies against an order passed under section 84 (2) We need not go further into the question of appealability of an order under section 84 (2) though we might say that there is great force in the argument that after the Full Bench decision in *Chikkanna Chettiar* v. *Perumal Chettiar*[3], the decision in the earlier case of *Rajagopala Chettiar* v. *H R E Board, Madras*[1], cannot be considered as good law As we said before, the question of *res judicata* does not depend upon the appealability of the decision which is put forward as constituting *res judicata* That question comes in incidentally to see if the proceeding under section 84 (2) is of a summary nature as so to attract the application of the decision of the Judicial Committee in *Bhagwan Din* v *Gir Harsaroop*[4] Apart from the appealability or otherwise, we have the fact that the parties are entitled to adduce evidence in the petition that the Court is bound to take such evidence and to act upon the materials placed before it after giving due weight to the order of the Board which it is called upon to modify or set aside. Substantial rights of parties to property and office are determined and we cannot therefore accept the argument of Mr Raghava Rao that the case falls within the decision of the Judicial Committee in *Bhagwan Din* v. *Gir Harsaroop*[4]. As was pointed out by the Full Bench in *Damodaran* v *H R E Board, Madras*[5], already referred to, the proceeding under section 84 (2) is analogous to a suit and the decision is one given in proceedings which are in the nature of a suit. We are in perfect agreement with that observation of the Full Bench in *Damodaran* v *H. R. E Board, Madras*[5].

There is another vexed question whether finality has been attached by the Legislature to the order passed by the District Court under section 84 (2). We cannot do better than refer to the different views expressed by Madhavan Nair and Jackson, JJ, in *Rajagopala Chettiar* v *H R E Board, Madras*[2] The question has been very elaborately dealt with and we need only refer to the judgment of Madhavan Nair, J, where the learned Judge has collected the various sections in which different language is used by the Legislature Clause 4 of section 53 says referring to the removal and dismissal of the trustees by the Committee that :

> " The order of the committee under this section shall, when no appeal is preferred or application made under sub-section (3), be final, and when such appeal is preferred or application is made the order of the Board or the *Court* as the case may be, shall be final "

Similar language is used in section 76 where it says that the order of the Board or the committee under sub-section (1) when no application is made under sub-section (2) and the order of the Court when such application is made shall be final. Under section 77, clause (2) and section 34, clause (2), the finality is declared and attached to the order of the Board subject to the result of the application which may be made to the Court Section 77, clause (2) says :

> " Any party affected by an order under sub-section (1) may within such time as may be prescribed apply to the Court to modify or set aside such order but, subject to the result of such application the order of the Board shall be final "

Similarly section 84 (2) says that :

> " a trustee affected by a decision under sub-section (1) may within one year apply to the Court to modify or set aside such decision, but subject to the result of such application, the order of the Board shall be final "

Referring to this divergence in the language, Madhavan Nair, J., stated his conclusion thus :

> " However, it may be stated that, though it is difficult to account satisfactorily for the difference in the language used in the two sets of sections, it is not clear despite the close proximity of the two sections 76 and 77 that the Legislature by using different language really intended to produce a different effect The expression " subject to the result of such application (to the Court) the order of the Board shall be final " may, I think, without doing any violence to the language, be interpreted to mean that the finality of the order of the Board is only subject to the result of an application to

1. (1941) 1 M L J 250. I L R (1941) Mad 559.
2. (1933) 66 M.L.J. 43 I L R. 57 Mad. 271 (F.B)
3. (1940) 1 M.L J. 732. I.L.R. (1940) Mad 791 (F B.)
4. (1940) 1 M L.J 1 L R. 67 I.A. 1 : I.L.R. 15 Luck 1 (P C)
5. (1930) 58 M.L J. 494 : I.L.R. 53 Mad. 266 (F.B.).

the Court and to nothing further If this view is correct then the orders of the District Court in sections 77 (2) and 84 (2) become as final as the orders of the Court in sections 53 (4) and 76 (3) "

We are inclined to accept this view If the order of the Board passed under section 84 (1) is final subject only to the result of the application to the Court under section 84 (2), it is difficult to say that the finality does not apply to the order of the District Court Perhaps, one reason why the finality is not expressly attached to the order of the District Court is that that order may be carried in appeal or in revision ; that the finality must be attached not to the decision of the District Court under section 84 (2) but to the decision of an appellate or a revisional authority.

Though the question is not free from difficulty, we have come to the conclusion that a proceeding under section 84 (2) of the Act is in the nature of a suit and that the decision of the District Judge operates as *res judicata* in a subsequent proceeding between the same parties. In this case the District Court decided that the appellants were not hereditary trustees at all. That is the basis of the decision of the District Court So far as the finding of a civil Court is concerned, the decision on a question which is substantially in issue also operates as *res judicata.* We need not deal with the question whether if the matter had stopped with an order of the Board under section 84 (1) the appellants would have been precluded from agitating that question in this suit It is not necessary for us to go into that question as it was the subject of an enquiry by the District Court followed by a decision by that Court

As we said in the opening, we are very much impressed by the fact that for four generations, as the documentary evidence shows, the eldest member in the appellants' family has been acting as trustee On one or two occasions some other persons in the village were referred to as trustees, but there is no gainsaying that the appellants' family have been acting as trustees And the documentary evidence establishes that for four generations the members of the appellants' family have been acting as trustees If the decision of the District Court under section 84 (2) had not stood in the way, we would have had no hesitation in saying that the appellants have established that they are the hereditary trustees of the suit temple. It is unnecessary to deal with evidence on the question as we have held that the appellants are not entitled to reagitate this question

Before concluding this judgment, we must notice another point raised by Mr Raghava Rao. He urges that the District Judge decided in O P No. 96 of 1942, that the evidence only pointed to the conclusion that the members of the appellants' family were acting as trustees only in respect of the properties endowed by their family to the temple and that that by itself does not constitute the appellants hereditary trustees of the temple itself He urges that his clients are the special trustees of the properties endowed by their family We agree with this contention. The District Judge has held that for several generations the appellants' family were acting as the trustees of the properties endowed by their family as inam to the temple. In fact the District Judge relied on the expression " inam trustee" occurring in the various documents to say that the members of this family were not acting as the general trustees of the temple but only as trustees of the inam The view taken by the District Judge certainly establishes that the members of the appellants' family are the special trustees in respect of the properties endowed by their family. Their position is that of *Kattalai* trustees. This would enable them to retain possession of the properties endowed by their family though they would be bound to devote the income of those properties for the purposes for which they were endowed by the family We mention this so that it should not be understood that our judgment has the effect of depriving the appellants even of the properties endowed by them. They are not hereditary general trustees of the temple and that is the only question that we decide This will be incorporated in the decree.

Subject to the above modification the appeal is dismissed But we make no order as to costs either here or in the Court below as we have affirmed the decree of the lower Court not on the grounds on which the lower Court has rested its judgment but on what happened subsequent to the decision of the lower Court We therefore direct each party to bear his own costs both here and in the Court below.

Item 6 was endowed by the ancestors of the appellants under Ex. P-1 of the year 1884. Items 2 and 3 were purchased at a revenue sale in the name of Kotayya, an ancestor of the appellants. This transaction is of the year 1886. Item 5 was purchased under Ex P-12 and the price was paid by Arikepudi Nagayya, Lingayya and Adeyya Of these Arikepudi Nagayya and Lingayya are members of the appellants' family We hold that items 2, 3, 5 and 6 are the subject of specific trust of which the appellants' family are the hereditary special trustees The decree will contain a declaration that items 2, 3, 5 and 6 are specific trusts of which the appellants are the hereditary special trustees and that they are not liable to be dispossessed of these items by the general trustee except in special proceedings to be taken for that purpose if there are grounds for doing the same

Items 1 and 4 form part of the general endowment of the temple and the decree of the lower Court will stand as regards those items

B V V ——— *Decree modified*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore)

PRESENT.—LORD THANKERTON, LORD GODDARD AND SIR JOHN BEAUMONT.

Mamand and others *Appellants**

v.

The King-Emperor *Respondent.*

Criminal Procedure Code (V of 1898), section 164—Statement under—Cannot be treated as substantive evidence of facts stated—Purpose for which it could be used

It is an error, not uncommon in Criminal Courts in India, to treat the statement made under section 164, Criminal Procedure Code, as substantive evidence of the facts stated The statement could be used to discredit the evidence of the witness given in Court, but not for any other purposse

A G P Pullan and *J. M. R. Jayakar* for Appellants.

J. M Pringle for Respondent

The Judgment of the Court was delivered by

SIR JOHN BEAUMONT —This is an appeal against a judgment of the High Court of Judicature at Lahore dismissing an appeal by the three appellants against a judgment of the Sessions Judge, Shahpur District, at Sargodha, convicting the appellants of the murder of one Naman and sentencing the first and third appellants to death and the second appellant to transportation for life. The High Court confirmed the said death sentences At the conclusion of the arguments their Lordships announced that they would humbly advise His Majesty that the appeals should be dismissed, and they now give their reasons for such advise.

The learned Judges of the High Court accepted the evidence of three eye-witnesses Raja Sarwar Khan (P.W. 11), Barkat (P.W. 13), and Samand (P.W 15) as to the manner in which the murder was carried out. The story of these th ee witnesses, which was in substantial agreement, was that they heard a commotion at the dera of one Gahra, that they saw the second and third appellants beating with sticks Naman who was on the ground, and they saw the first appellant Mamand, grappling with Gahra The three witnesses ran towards the disturbance, Raja Sarwar Khan and Samand shouting that the assailants should be caught Before the witnesses reached the spot the three appellants ran away and were chased for some distance by the witnesses and two other men who had come up. Barkat says that the second and third appellants got the first appellant released from Gahra In the Sessions Court Gahra gave evidence that the murder was committed, not by the accused, but by five other men; but in a statement which he had made before a magistrate under section 164 of the Code of Criminal Procedure he had named the appellants as the assailants and attributed to the first appellant the first blow given to Naman. The learned Sessions Judge fell into an error, not uncommon in Criminal Courts in India, of treating the statement made under

* P C. Appeal No 50 of 1945 30th October, F945

section 164 as substantive evidence of the facts stated. The statement could be used to discredit the evidence of Gahra given in Court, but not for any other purpose. In the High Court the learned Judges considered that, in view of the statement under section 164, Gahra had been won over by the defence, and that his evidence must be entirely ignored. This was the correct attitude. The evidence of the eye-witnesses, which was consistent with the medical evidence as to the cause of death, justified the finding of the High Court that the second and third appellants were guilty of murder and the only point which really arises on this appeal is whether there was evidence to justify the conviction of the first appellant under section 302 read with section 34 of the Indian Penal Code.

Section 34 is in these terms :—

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

If the evidence of the three eye-witnesses stood alone, it could not be said to establish that the first appellant, who was merely grappling with Gahra, had formed a common intention with the second and third appellants to murder Naman. But the evidence did not stand alone. There was evidence on the record, which the High Court accepted, that the first appellant had strong grounds for entertaining feelings of enmity against Naman, grounds based on the relations of the first appellant and Naman with a Muslim girl named Fatima or Phapho ; that the second appellant, a boy of 15, was a younger brother of the first appellant, that the third appellant was their tenant, and that all three accused lived at the dera of the first appellant. There was also the fact deposed to by the eye-witnesses that after the assault the three accused ran away together ; also there was no evidence of enmity between Gahra and Naman. In their Lordships' opinion the evidence afforded ample material upon which the learned Judges of the High Court could hold, as they did, that the first appellant was grappling with Gahra so that he might not rescue Naman from the clutches of the second and third appellants, and this justified the inference that the murder was committed in furtherance of the common intention of all the appellants. There is therefore no reason for interfering with the convictions.

Solicitors for Appellants : *Douglas Grant & Dold*

Solicitor for Respondent *The Solicitor, India Office*

H J.U./V S. ——— *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the West African Court of Appeal.)

PRESENT :—LORD PORTER, LORD GODDARD AND SIR JOHN BEAUMONT.

Kwaku Mensah .. *Appellant**

v.

The King .. *Respondent.*

Criminal trial—Non-direction to jury—Charge of murder—Accidental killing, the only plea in defence—Question whether or not offence might be manslaughter only, on the ground of provocation—Duty of Court to put to the jury—Failure to do so—Interference by the Privy Council, when such omission is neither made a ground of complaint in the lower Courts nor included in the reasons given in the appellant's printed case before the Board—Assault—Pointing a gun at a person.

An accused charged with murder pleaded accidental killing as the only defence No attempt was made in the lower Courts to argue that there was sufficient provocation to reduce the crime to manslaughter The Judge in his direction to the jury said that the question of manslaughter could only arise if they accepted the accused's evidence that the killing was accidental On a contention that as there was evidence of matters which could amount in law to provocation sufficient to reduce the crime to manslaughter, this ought to have been submitted by the Court to the jury, and that the failure to do so was enough to justify the Board entertaining the appeal on the ground that there has been a failure of justice in this respect,

Held, if on the whole of the evidence there arises a question whether or not the offence might be manslaughter only, on the ground of provocation as well as on any other ground, the Judge must put the question to the jury The reason for the rule is that on an indictment for murder it is open to a jury to find a verdict of either murder or manslaughter but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the Judge is not bound to leave

* P C. Appeal No. 7 of 1945 11th October, 1945

it to them to find murder or manslaughter But if there is any such evidence then whether the defence have relied on it or not the Judge must bring it to the attention of the jury because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder The question whether in the circumstances the provocation was such as to deprive an ordinary person of self-control and whether sufficient time had elapsed to enable control to be regained are questions for the jury It follows therefore that the direction to the jury was wrong and that it had resulted in a failure to take the opinion of the jury on a matter which, had they accepted the evidence, might have avoided a conviction for a capital crime The omission to place a matter of such grave importance would justify the Board in entertaining the appeal though it would be seldom that the Board would consider a matter which was not only not mentioned in the Courts below, but was not included in the reasons given by the appellant in his printed case

Pointing a gun at a person is an assault unless done in protection of person or property If it is pointed at a person without legal excuse, it is an unlawful act

Sir A. Wort Dingle Foot for Appellant

F. Gahan for Respondent.

The Judgment of the Court was delivered by

LORD GODDARD.—Their Lordships now give their reasons for the humble advice which they have tendered to His Majesty that this appeal should be allowed and a verdict of manslaughter substituted for that of murder.

The appeal was brought by special leave against a judgment of the West African Court of Appeal dismissing the appellant's appeal against his conviction for the murder of one Abudv Zabrama before Lane, J. and a special jury on 15th May, 1943. It appears that in the early morning of 27th November, 1942, the deceased man with some of others of his tribe, the Zabrama, arrived at the village of Kajakron, where the appellant lived, carrying bundles of cloth which they were intending to smuggle into French territory. According to the witnesses for the prosecution they reached the village when it was light, either just before or just after daybreak, while according to the defence they arrived in the dark when the villagers were asleep An alarm was given by someone, and there were cries of "thief" and a fight ensued The theory of the prosecution was that the villagers attacked the Zabrama with the object of stealing the goods they were carrying. On the other hand the case for the defence was that the incident started because the tribesmen, or some of them including the deceased, entered the compound of the appellant and tried to break into his home. However the fracas started there seems to be no doubt that in the course of the fight the appellant was stabbed, receiving a wound some four inches long on his hip, and according to his evidence it was inflicted by the deceased. The Zabrama, being outnumbered, made off to the Mohammedan part of the village, the Zongo. The deceased, who was being chased by the appellant among others, entered a house and was followed by some of the villagers, still calling out "thief". The deceased ran out of the house and as he was running away the appellant fired a gun and killed him

The appellant and nine others of the villagers were charged with murder, the appellant as a principal in the first degree and the others as abettors The sole defence set up at the trial on the part of the appellant was that he presented the gun with the object of frightening the deceased and inducing him to surrender. The learned judge in the course of his summing up directed the jury that there were three possible verdicts that they could return, murder, manslaughter and acquittal, and that in his opinion no verdict of manslaughter could be entered unless the jury accepted the appellant's own account as to how he shot the deceased. He further directed them that if they did accept that account the appellant would be guilty at least of manslaughter as pointing a gun at the deceased as he was running away was an unlawful act The jury found the appellant guilty of murder, but the other nine accused were found by them guilty only of manslaughter. On appeal, the West African Court of Appeal dismissed the appeal of the present appellant, holding that though in their opinion there was a misdirection in saying that on the appellant's own evidence he was at least guilty of manslaughter, a matter with which their Lordships deal hereafter, the jury must have rejected his evidence as was shown by their returning a verdict of murder With regard to the remaining accused they quashed the conviction on the ground that the jury should have been

directed that in their case the only possible verdicts were murder or acquittal. The case of these other nine accused is of course not before their Lordships

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[After negativing the submission on behalf of the appellant that the Court which heard the appeal was not properly constituted their Lordships proceeded]

The next point that was submitted for the appellant depends partly on the direction of the learned trial judge and partly on the verdict with regard to the prisoners other than the appellant who were found guilty by the jury of manslaughter only. As has already been said the appellant's defence was that he pointed the gun at the dead man only for the purpose of frightening him, that he did not know it was loaded and that it was discharged accidentally The learned trial judge directed the jury that only in the event of the appellant's evidence being accepted could a verdict of manslaughter and not murder be returned against him Their Lordships think it is clear that his direction was that if the jury thought that his account was true the appellant was on his own showing guilty of manslaughter because the pointing of the gun was in itself an unlawful act from which death resulted The Court of Appeal however held that to be a misdirection, because, they said, pointing a gun which he did not know was loaded was not an unlawful act On this point their Lordships are in agreement with the learned trial Judge and disagree with the view taken by the Court of Appeal. Pointing a gun at a person is an assault unless done in protection of person or property. If it is pointed at a person without legal excuse, and there was none here as the dead man was running away, it is an unlawful act They need only to refer among the many cases on the subject to *R* v *Jones*[1] and *R* v *Weston*[2]. But they agree with the Court of Appeal that by their verdict of murder the jury show that they rejected the appellant's evidence on this subject. Then it is said that as the other accused were only abettors and were found to have abetted manslaughter only it is impossible for the verdict of murder against the accused to stand Their Lordships have not to consider the case of the other accused whose convictions have been quashed but they are quite unable to agree with the argument that because the jury found those accused persons guilty only of manslaughter that can affect the verdict of murder against the principal offender There was ample evidence of deliberate firing by the accused and but for the point with which their Lordships will now proceed to deal they would not have been able to advise His Majesty to allow the appeal

It was finally submitted on behalf of the appellant that as there was evidence of matters which could amount in law to provocation sufficient to reduce the crime to manslaughter this ought to have been submitted by the Court to the jury, and the failure to do so on the part of the trial judge and the failure to consider it by the Court of Appeal was enough to justify the Board entertaining the appeal on the ground that there had been a failure of justice in this respect. It does not appear that any attempt was made in either of the Courts below to argue that there was sufficient provocation to reduce the crime to manslaughter and indeed as the defence relied on was one of accidental killing it is not surprising that counsel for the prisoner did not attempt to set up what would appear to be inconsistent with that defence But if on the whole of the evidence there arises a question whether or not the offence might be manslaughter only, on the ground of provocation as well as on any other ground, the Judge must put that question to the jury. This was distinctly laid down in *R* v *Hopper*[3], a case in some respects resembling the present, more especially in that the line of defence adopted was that the killing was accidental and no attempt had been made at the trial to rely on provocation This ruling was expressly approved by the House of Lords in *Mancini* v. *R*[4] The reason for the rule is that on an indictment for murder it is open to a jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder if that

1. 12 Cox 628.
2. 14 Cox 346.
3. (1915) 2 K B 431
4. (1942) A.C 1.

verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then whether the defence have relied on it or not the Judge must bring it to the attention of the jury because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder Now in the present case there was undoubtedly a fracas in which at some stage the prisoner took part and in which he was admittedly stabbed at a time before the shot was fired. The case was that the deceased man tried to get into his house after he had retired for the night and that he received the wound while trying to drive off or capture the intruder

If that was true the stabbing would undoubtedly have amounted to provocation. The prosecution's case was on the other hand that the disturbance was caused by the villagers attacking the dead man and his fellow smugglers for the purpose of robbing them. As the case developed at the trial the truth of these two versions became immaterial, but on the issue of provocation it was all important If a man is struck or stabbed while defending himself or his property or while trying to apprehend a thief there can be no question but that it amounts to provocation of the most serious character The jury accordingly ought to have been told to consider whether the accused received his wound while acting in defence of his property or whether he got it in consequence of an attempt by him to steal from or injure a man who had done him no harm That would have enabled them to say whether there was provocation in fact. Then another question would have arisen. The law relating to murder and manslaughter in the Gold Coast is contained in the Criminal Code, but in all material respects the Code reproduces the Common Law of England on the subject. Section 233 provides that intentional homicide shall be manslaughter only, if among other matters of extenuation it is proved on the accused's behalf that he was deprived of the power of self-control by such extreme provocation given by the person killed as is mentioned in section 234 Among the matters which may amount to extreme provocation is an unlawful assault of such a kind . . as to be likely to deprive a person being of ordinary character and in the circumstances in which he was of the power of self-control Then section 235 excludes the benefit of provocation where the accused was not in fact deprived of the power of self-control and also where after the provocation such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self-control. This puts into statutory form what has for long been the law in this country Now it may be said with a great deal of force that the prisoner's own evidence was that he had not lost self-control So it might have been in *Hopper's case* (supra)[1] In both cases it was inevitable that this should be so seeing that the line of defence was accident But if the jury reject that defence it yet may be that in truth the shooting was due to a lack of self-control caused by provocation Then again it can be said that as there had been a chase and the dead man had fled to a house and was killed while he was escaping from the house and was shot from behind there must have been time for an ordinary person to have regained control of his passion In their Lordships' opinion however the question whether in the circumstances the provocation was such as to deprive an ordinary person of self-control and whether sufficient time had elapsed to enable control to be regained are questions for the jury There may no doubt be cases where the facts were such that they could not be made the subject of extenuation, for instance a blow or wounding one day, and a killing after a night had elapsed Here though there is no evidence how long after the stabbing the shooting took place it seems clear it was all in the course of one continuing fracas The tests have to be applied to the ordinary West African villager and it is on just such questions as these that the knowledge and common sense of a local jury are invaluable In both *R* v *Hayward*[2] and *R* v. *Thomas*[3], sometime had elapsed between the provocation and the fatal act, but in both cases it was left to the jury to say whether in the circumstances the crime amounted to murder or only

1 (1915) 2 K B 431
2 6 C and P 157
3 7 C and P 817

manslaughter It follows therefore that the direction to the jury that the question of manslaughter could only arise if they accepted the accused's evidence that the shooting was accidental was wrong. It has resulted in a failure to take the opinion of the jury on a matter which, had they accepted the evidence, might have avoided a conviction for a capital crime The principles upon which this Board acts in criminal cases are well known and need no repetition, but when there has been an omission to place before the jury for their consideration a matter of such grave importance that they were never led to consider whether in this respect the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter, their Lordships think that they can properly entertain the appeal They would add that it must be seldom that they consider a matter which was not only not mentioned in the Courts below, but was not included in the reasons given by the appellant in his case It was not indeed raised till his junior counsel addressed the Board, but in view of the opinion of the House of Lords, in *Mancini's case* (supra)[1] as to the duty of the Court in such circumstances as they find existed here, they have thought it right to consider the matter, although not raised in the printed case. It is impossible to say what verdict would have been returned had the case been left to the jury with a proper direction. In these circumstances it is proper to take the course followed by the Court of Criminal Appeal in *Hopper's case* (supra)[2] and substitute for the jury's verdict one for the lesser offence Their Lordships have accordingly humbly advised His Majesty that this appeal should be allowed and the verdict of guilty of murder and the sentence of death passed on the appellant should be set aside ; that the case should be remitted to the West African Court of Appeal with directions to them to substitute for the verdict found by the jury a verdict of guilty of manslaughter and to pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that offence

Solicitors for Appellant *A. L Bryden & Co.*

Solicitors for Respondent · *Burchells*

H J.U./V S. ——— *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE HORWILL AND MR JUSTICE KOMAN.

Nidamarti Venkata Narasimham .. *Appellant**

v.

Pogaku Nagojirao . *Respondent.*

Civil Procedure Code (V of 1908) section 105—Scope—Order setting aside the dismissal for default of an application to set aside a sale—Cannot be questioned in an appeal against the final order

Where the effect of an order is to prevent an enquiry into the merits such an order would come within the scope of section 105 of the Civil Procedure Code as affecting the case on merits but where the orders do not affect the decision of the case on the merits such orders would not come within the scope of the section Applying this principle, an order setting aside the dismissal for default of an application to set aside a sale under Order 34, rule 6 of the Civil Procedure Code, cannot be questioned in an appeal against the final order in as much as it only reopens an enquiry and does not affect the decision of the case

Alagappa Chetty v *Annamalai Chetty*, (1916) 4 L W 411, *Athamsa Rowther* v *Ganesan*, (1924) 47 M.L J 641 and *Venkatanarasu* v *Kotayya*, (1926) 51 M L J 119, referred to

Appeal against the order of the District Court, East Godavari, at Rajahmundry, dated 5th October, 1944, in E A No 298 of 1941 in E. P No. 7 of 1941 in O. S. No 18 of 1938, etc.

C. Rama Rao, N Narasimham, N Ramakrishnayya, P Satyanarayana Rao for Appellant

P. Somasundaram and *D Narasaraju* for Respondent.

The Judgment of the Court was delivered by

Koman, J.—The first respondent was the judgment-debtor in O. S No. 18 of 1938 on the file of the Court of the District Judge, East Godavari. Some of the

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1 (1942) A C 1

2 (1915) 2 K B 431

* A A O Nos. 70 and 110 of 1945 and C. R P Nos 207, 208, 297 and 298 of 1945

12th December, 1945

first respondent's properties were sold in execution of the decree and were purchased by the decree-holder and two others who are the appellants before this Court. In E. A. No 298 of 1941 the first respondent applied for setting aside the sale on the grounds of certain irregularities in the conduct of the sale A compromise petition was filed by which the parties agreed to the petition being allowed on payment of the decree amount with poundage interest and commission, etc The first respondent deposited a sum of Rs. 16,500 and applied in E. A. No. 296 of 1942, for setting aside the sale under Order 34, rule 6. The auction purchasers opposed the applications on the ground that the correct amount had not been deposited On 25th February, 1943, when the petition came on for hearing as the first respondent was not present they were dismissed for default and the sales confirmed. On two subsequent applications, E A Nos. 71 and 72 of 1943 for setting aside the default orders the order of dismissal for default was set aside on 2nd March, 1943. By way of abundant caution the first respondent also filed E. A. No 93 of 1943 for setting aside the confirmation of the sales.

The learned District Judge has held that the order dated 2nd March, 1943, setting aside the orders of dismissal for default had become final He also held that the fact that the order confirming sale was not set aside would not stand in his way of disposing of the applications on their merits as the effect of setting aside the orders of dismissal for default was that the confirmation of the sale was automatically set aside. On the merits he held that the word interest referred to in the consent order related only to the interest due to the decree-holder, that no interest was payable to the auction purchasers as they were compensated by payment of commission and that the amount deposited in Court was in excess of the correct amount.

These appeals and revisions are by the two auction purchasers other than the decree-holder who is also an auction purchaser.

The main ground of attack by the appellants is that the learned District Judge had no jurisdiction to set aside the order of dismissal for default But the first respondent contends that they were precluded from raising this objection as those orders restoring the petitions had become final.

In *Alagappa Chetty* v. *Annamalai Chetty*[1], it was held that the principle of section 105 of the Code of Civil Procedure would apply not only to decrees and interlocutory orders which lead up to the final order. In *Radha Mohan Datt* v. *Abbas Ali Biswas*[2], a Full Bench of the Allahabad High Court held that the words " affecting the decision of case " in section 105 of the Code of Civil Procedure are equivalent to " affecting the merits of the case " and that the correctness of an order cannot be challenged in an appeal against the decree unless the order affected the case on its merits and that an order setting aside an *ex parte* decree is not one that affects the case on merits but merely ensures a re-hearing of the case on merits In *Athamsa Rowther* v. *Ganesan*[3], a Bench of this Court observed :

> " It seems to us that the present case is another in which an order setting aside an *ex parte* decree may be properly attacked It is clear that, when the result of the setting aside of the order has been the hearing of the suit *de novo* on its merits, no injustice would be done to any one by the decision of the case and the final result is not affected."

In such circumstances we cannot but hold that an order setting aside the *ex parte* final decree while retaining the *ex parte* preliminary decree as an order affecting the decision of the case In *Venkatanarasu* v. *Kotayya*[4], a Letters Patent Appeal, a Bench of this Court held that the proper test is " does the order in question lead to an enquiry and investigation of the case as a result of the enforcement or does it prevent such an enquiry ? In the former case the final decision of the case is not affected merely by reason of the enquiry being held, whereas in the latter the result is different. In arriving at a decision as to whether an interlocutory order affects the decision of the case within the meaning of section 105, clause (1) of the Civil Procedure Code the nature of the order in relation to the facts of the particular case has to be considered."

1. (1916) 4 L W 411.
2. (1931) I L R 53 All 612 (F B.).
3. (1924) 47 M L J 641.
4. (1926) 51 M L J 119.

The principle that is deducible from the above cases seems to us to be that where the effect of the order is to prevent an enquiry into merits such an order would come within the scope of section 105 of the Code of Civil Procedure as affecting the case on merits but where the orders do not affect the decision of the case on merits such orders would not come within the scope of section 105 of the Code of Civil Procedure Applying this principle it is clear that the orders setting aside the dismissal for default as it only reopens an enquiry and does not affect the decision of the case cannot be questioned in these appeals against the final orders

We agree with the learned Judge that the effect of setting aside the orders of dismissal for default operates automatically to set aside the orders of confirmation of the sales

The only other point to be considered is whether the judgment-debtor had complied with the terms of the consent memo. in making a deposit of Rs 16,500 The dispute as regards this depends on whether interest was payable to the auction purchaser The learned Judge rightly held that the word interest in the consent memo. refers only to the interest payable to the decree-holder and not to the auction purchasers as they were sufficiently compensated for by deposit of commission

The appeals and revision petitions are dismissed with costs of first respondent who will receive half costs in each civil miscellaneous appeal.

V S ——— *Appeals and Revision Petitions dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR JUSTICE SOMAYYA AND MR JUSTICE YAHYA ALI

In the matter of a Pleader.*

Legal practitioner—Pleader—Purchase in the name of his clerk at auction held in execution proceedings instituted by him on behalf of his client—Subsequent transfer of the property to the pleader's wife—Conduct though open to criticism does not amount to professional misconduct—Legal Practitioners Act (XVIII of 1879)*—Rules framed under—Rule* 17*—Civil Procedure Code, Order* 21, *rule* 73*—Legal practitioner not within the purview of rule* 73 *of Order* 21*—Necessity for a rule to prohibit a legal practitioner from bidding at such sale*

Rule 17 of the rules framed by the High Court under the Legal Practitioners Act only prohibits a practitioner from purchasing from his client or from any other person any interest in a decree passed by the Court in which he practises, but there is no rule prohibiting a practitioner from bidding at an auction held in execution proceedings instituted by him on behalf of his client

Where a pleader bought in the name of his clerk property at an auction held in execution proceedings instituted by him on behalf of his client but with the knowledge that his client did not wish to bid for it and subsequently had it transferred to his wife,

Held, that though the pleader's conduct in the matter was open to criticism, in the circumstances, it could not be held to be professional misconduct

The addition of the words "or other person" in rule 73 of Order 21 do not bring within the purview of the rule a legal practitioner The legal practitioner has no duty to perform in connection with the sale

There should be a rule prohibiting a practitioner from bidding either in his own name or in the name of another person at a Court sale held in execution of a decree obtained by his client His first duty is to his client and it might happen that their interests would clash Consequently steps should be taken to prohibit by rule a practitioner bidding at such a sale

The Advocate-General (*K Rajah Aiyar*) in support of the notice

K Bashyam for *D Ramaswami Ayyangar* and *K M Venkatavaradachariar* for the Pleader

P. Chandra Reddi for Complainant

The Judgment of the Court was delivered by

The Chief Justice.—The respondent is a First Grade Pleader. Two charges of professional misconduct were framed against him. The first charge was that he was guilty of fraudulent and grossly improper conduct in that contrary to specific instructions given to him by his client he purchased in the name of his clerk property sold in execution of a decree obtained by his client and later had the property conveyed to his wife. The second charge was that he had unlawfully retained a sum of Rs. 129-7-0 out of an amount drawn from Court by him on behalf of his client. The charges were investigated by the District Munsiff of Conjeevaram whose report

* Referred Case No 32 of 1945 7th January, 1946.

is now before us The learned District Munsiff held that the respondent was entitled to be acquitted on both the charges and we accept his findings No comment is called for on the finding in respect of the second charge, but we think it necessary to examine the law bearing on the first charge.

The respondent filed the application for execution of the decree obtained by his client, the complainant In due course an order for attachment and the sale of certain immoveable property was obtained The property was subject to a mortgage for Rs 400 On the 31st August, 1942, the respondent wrote to his client informing him that the auction had been fixed for the 2nd November, and asked him if he wanted to purchase the property at the auction He pointed out that if he did wish to bid, he must file a petition asking for permission to do so As no reply was received to this letter, the respondent wrote to his client on the 5th October, 1942, tendering similar advice, and adding .

"If any one bids and takes the property on that date, I shall send you the sale proceeds thereof by money order"

The complainant ignored this letter also and at the auction, the highest bidder was the respondent's clerk The reserve price was fixed at Rs 100. The clerk's bid was Rs 101 On the 7th March, 1943, the clerk conveyed the property to the respondent's wife, the ostensible consideration being Rs 1,000 The respondent alleged that the clerk had bought the property at the auction and that it was conveyed by the clerk to the respondent's wife without his knowledge The truth of these statements was not accepted by the District Munsiff and we are not prepared to accept them We will deal with the case on the basis that the respondent bought the property in the name of his clerk and subsequently had it transferred to his wife, but with knowledge that his client did not wish to bid for it

Rule 17 of the rules framed by this Court under the Legal Practitioners Act prohibits a practitioner from purchasing from his client or from any other person any interest in a decree passed by the Court in which he practises, but there is no rule prohibiting a practitioner from bidding at an auction held in execution proceedings instituted by him on behalf of his client

In *Alagirisami* v *Ramanathan*[1], a Bench of this Court (Collins, C J. and Brandt, J) held that pleaders of parties to a suit were not debarred by section 292 of the Code of Civil Procedure from purchasing property sold in execution of the decree The section corresponds to rule 73 of Order 21 of the present Code, which reads as follows

"No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold"

Section 292 of the old Code did not contain the words "or other person"; but otherwise the wording was the same In *Alagirisami* v. *Ramanathan*[1], the Court held that a vakil could not be said to have a duty to perform in connection with the sale within the meaning of the section If the Legislature had intended to prohibit vakils generally from purchasing it would have said so in plain language as it had done in the case of the Transfer of Property Act Section 136 of the Transfer of Property Act prohibits a legal practitioner from buying or trafficking in an actionable claim

We do not regard the addition of the words "or other person" as bringing within the purview of the rule a legal practitioner The legal practitioner has no duty to perform in connection with the sale His duty is to obtain the order for sale, but he has no duty to perform at the auction The effect of the judgment in *Alagirisami* v *Ramanathan*[1] is that it is not professional misconduct for a pleader to bid at a Court-sale, except where he has received instructions from his client to bid on his behalf

In *Subbarayudu* v *Kotayya*[2], the Court had to consider the position when the vakil had acted contrary to his client's instructions A mortgagee had obtained a decree on her mortgage and her vakil purchased the property at the Court sale.

1 (1886) I L R 10 Mad 111
2 (1892) 2 M L J 166 I L R 15 Mad 389.

He had not informed his client that he intended to bid nor had he obtained the sanction of the Court to do so. In fact, he had been instructed by his client to bid on her behalf and had obtained the necessary permission from the Court In contravention of his client's instructions, he bought the property on his own behalf Wilkinson and Subramanya Ayyar, JJ., held that in the circumstances the sale was bad and they set it aside The question of professional misconduct was not raised, but clearly the vakil was guilty of professional misconduct as he acted contrary to his client's specific directions and moreover he did so for his own benefit.

The Allahabad High Court in *Shiam Lal* v. *Girraj Kishore*[1] held that the clerk of a pleader of a decree-holder was not debarred by rule 73 of Order 21 of the Code of Civil Procedure from purchasing property sold in execution of the decree The rule was merely intended to prohibit all those who had anything to do with the machinery of the sale having any interest, direct or indirect, in the result of the sale. From what we have already said, this is also our opinion of the effect of the rule

In In the matter of *Har Prasad Singh, Vakil*[2], the Allahabad High Court held that if a pleader acting for the decree-holder, purchased the property sold in execution of his client's decree, he is guilty of professional misconduct, but the decision was based on a rule of that Court.

In view of the fact that there is at present no rule of the Madras High Court prohibiting a practitioner bidding at an auction held in pursuance of a decree obtained by his client and having regard to the decision of this Court in *Alagirisami* v. *Ramanathan*[3], the respondent cannot be held guilty of professional misconduct. He was entitled to rely on the judgment in *Alagirisami* v *Ramanathan*[3], the correctness of which has hitherto not been questioned The respondent's conduct in buying the property surreptitiously in the name of his clerk and in having it transferred to his wife's name is no doubt open to criticism, but in the circumstances we cannot hold it to be professional misconduct His client had refused to apply for leave to bid himself and was obviously content to take whatever price was realised at the court auction provided the reserve price was reached

At the same time we are firmly of the opinion that a legal practitioner should not be allowed to bid at a Court sale held in execution of a decree obtained by his clients and that there should be a rule, as there is in Allahabad, prohibiting a practitioner from bidding either in his own name or in the name of another person at a Court sale held in execution of a decree obtained by his client. His first duty is to his client and it might happen that their interests would clash Consequently we are of the opinion that steps should be taken to prohibit by rule a practitioner from bidding at such a sale.

As we have found the respondent not guilty of the charges against him, the report is accepted and the complaint against him dismissed. We make no order as to costs

V.S. ——— *Complaint dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE PATANJALI SASTRI.

The Commissioner of Income-tax, Madras *Applicant**

v.

The Motors and General Stores, Ltd, Bobbili *Respondent.*

Income-tax Act (XI of 1922), sections 10 (2) (vi), (3) and 26 (2)—Machinery used only for part of the accounting year—Right to deduct full allowance for depreciation

Where an assessee, a limited liability company had worked an oil mill only for two months and seven days in the year of account, on a question whether the company was entitled to a deduction of the full allowance for depreciation contained in section 10 (2) (*vi*) of the Income-tax Act,

1. (1926) I L R 49 All 292
2. (1912) 17 I C 539 (F B)
3. (1886) I L R 10 Mad 111.

* Referred Case No. 17 of 1945. 18th January, 1946.

Held, that on the wording of the section, the assessee was entitled to an allowance as if the machinery had been worked throughout the year This interpretation of the section will not affect the Income-tax authorities detrimentally inasmuch as the allowance of the full amount for the year of account will only mean that the benefit conferred on the assessee by section 10 (2) (*vi*) will be more quickly worked out

Held further, that sub-section (3) of section 10 and sub-section (2) of section 26 could not govern section 10 (2) (*vi*) because sub-section (3) of section 10 cannot deprive the assessee of what he is entitled to under clause (*vi*) of sub-section (2) of section 10 and sub-section (2) of section 26 is not concerned with the computation of tax.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (*i*) of the Indian Income-tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-tax Amendment Act (Act VII of 1939), in Application 66 R. A. No. 49 Madras of 1944-1945 (Assessment year 1942-1943) on its file.

C. S. Rama Rao Sahib for Applicant.

T. V. Viswanatha Aiyar for Respondent.

The Judgment of the Court was delivered by.

The Chief Justice.—The assessee is a limited liability company. During the whole of the year of account (1942-43) it carried on business in electrical stores in the distribution of electricity For part of the year, namely, from the 23rd January, 1942 to the 31st March, 1942, it also carried on an oil mill business. Although the oil mill had only worked for two months and seven days in the year of account, the company claimed to be entitled to deduct the full allowance for depreciation contemplated by section 10 (2) (*vi*) of the Income-tax Act. The Income-tax Officer held that the company was only entitled to a proportionate allowance and this decision was accepted by the Appellate Assistant Commissioner. On appeal by the assessee to the Income-tax Appellate Tribunal, the decision of the Appellate Assistant Commissioner was reversed The Tribunal held that on the wording of the section, the assessee was entitled to an allowance as if the machinery had been worked throughout the year.

At the instance of the Commissioner of Income-tax, Madras, the Tribunal has, under section 66 (1) of the Act, referred to this Court the following question :

" Whether on the facts and in the circumstances of the case when the assessee actually used the plant and machinery for the purpose of his business in the previous year only for a period of two months and seven days, the assessee can be granted a depreciation allowance under section 10 (2) (*vi*) for the whole period of the previous year in question ?"

While conceding that there is no indication in clause (*vi*) of sub-section 2 of section 10 that the allowance for depreciation is dependent on a time factor and that if the clause stood alone the assessee would be entitled to the full allowance, Mr. Rama Rao Sahib on behalf of the Commissioner says that sub section (3) of section 10 and sub-section (2) of section 26 govern the clause and make it necessary to read it as the department has read it.

We can find nothing in sub-section 3 of section 10 or in sub-section 2 of section 26 to support this argument Sub-section 3 of section 10 reads as follows :

" Where any building, machinery, plant or furniture in respect of which any allowance is due under clause (*iv*), clause (*v*), clause (*vi*) or clause (*vii*) of sub-section (2) is not wholly used for the purposes of the business, profession or vocation, the allowance shall be restricted to the fair proportional part of the amount which would be allowable if such building, machinery, plant or furniture was wholly so used "

This sub-section only makes provision to meet a situation where the machinery is used in part for the business of the assessee and in part for other purposes In this case the machinery of the oil mill was used wholly for the assessee's business. The word " wholly " does not mean wholly throughout the year. Clearly sub-section (3) cannot deprive the assessee of what he is entitled to under clause (*vi*) of sub-section (2)

Section 26 (2) is merely a provision to meet the case where a person carrying on a business, profession or vocation is succeeded in the course of the year of account by another person who carries on the same business, profession or vocation. The

Privy Council pointed out in *Indian Iron and Steel Co, Ltd.* v. *Commissioner of Income-tax, Bengal*[1], that this sub-section (2) of section 26 is not concerned with the computation of tax, but with the person upon whom the liability is imposed When one wants to compute what is payable by way of tax, one has to go to section 10.

Mr Rama Rao Sahib has suggested that the judgment in this case supports his argument, but we do not agree There the appellant company had taken over the business of another company as and from the 2nd December, 1936 The company whose business was taken over had worked at a loss and its unappropriated depreciation allowance stood at a very large figure The contract between the two companies contained a clause assigning to the appellant company, so far as was capable of being assigned, any claim which the old company had in respect of unabsorbed depreciation allowance By virtue of this assignment, the appellant company claimed to be entitled to set off against its profits the unabsorbed depreciation allowance of the old company, but the Privy Council held otherwise This was the sole question in the appeal The question now before us was not even raised before their Lordships Inasmuch as their Lordships did hold that section 26 (2) as it was before its amendment was not concerned with the computation of tax, their judgment, if anything, is against the argument now advanced on behalf of the Commissioner.

We hold that the Income-tax Appellate Tribunal rightly decided the case and consequently answer the question referred in the affirmative We may add that this interpretation of the section will not affect the Income-tax authorities detrimentally. The depreciation can only be allowed to the extent of the cost of the machinery and the allowance of the full amount for the year of account will mean that the benefit conferred on the assessee by section 10 (2) (*vi*) will be more quickly worked out

The Commissioner must pay the costs of the assessee—Rs. 250.

V.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Chem Abbheong represented by K. N. K. Subramaniam Chettiar .. *Appellant**

v.

M. A Packiri Mahomed Rowther and others .. *Respondents*

Civil Procedure Code (*V of* 1908), *section* 83, *Explanation*—" *Alien enemy residing in a foreign country*" —*Interpretation*—*Person residing in foreign country in the temporary occupation of an enemy army*—*Defence of India Rules* (1939), *rules* 97 *and* 2—*Applicability*

An enemy army in temporary occupation of a foreign country cannot be said to be the " Government " of that country so as to make a person residing in such country an alien enemy, who is prohibited by section 83 of the Code of Civil Procedure from suing in any British Indian Courts

Such a resident cannot be said to be an " enemy " within the meaning of rule 97 of the Defence of India Rules read with rule 2

Thenappa Chettiar v *Indian Overseas Bank, Ltd*, (1943) 2 M L J 201 and *Manasseh Film Co* v. *Gemini Pictures Circuit*, (1944) 1 M L J 58 I L R (1944) Mad 124, approved

Difference between English Trading with the Enemy Act, section 15 (1) and the Defence of India Rules, rule 2 (2) (*a*) pointed out and *Sovfracht* (*V/O*) v *Van Udens Schoepvaert En Agentuur Maatschappy* (*N V Gebr*), (1943) A C 203, distinguished

Decision of Byers, J, in *Packiri Mahomed Rowther* v *Chow Ah Choong*, (1944) 2 M L J 293, reversed.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Byers, J,† dated 7th August, 1944, in S A No 330 of 1943 preferred to the High Court against the decree of the Court of the Subordinate Judge, Tanjore, in A S No 142 of 1942 preferred against the Court of the District Munsiff of Tanjore in O S No. 118 of 1939

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1 (1943) 2 M L J 325 I L R (1943) 2 Cal 524 (P C)

*L P A No 74 of 1944 28th November, 1945

† (1944) 2 M L J 293

K. Srinivasan for Appellant

M S. Venkatarama Aiyar and *T S Venkatarama Aiyar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal has given rise to an interesting argument, but when the statutory provisions with which it is concerned are examined the decision does not present great difficulty

On the 27th August, 1938, the appellant, a Chinaman, carrying on business at Penang in the Federated Malay States, instituted a suit in the Court of the District Munsiff of Pattukottai, the suit which has given rise to this appeal He had business dealings in Penang with one Sheik Ali, who was the assignee of a mortgage created on the 30th August, 1922 by the father of the first, second and third defendants. On the 23rd April, 1930, Sheik Ali left a will under which he bequeathed all his properties to the plaintiff in satisfaction of money which he owed to him. The testator died on the 28th May, 1930 The suit was to enforce payment of the amount due under the mortgage of 30th August, 1922, the property covered by it being situate in the jurisdiction of the District Munsiff of Pattukottai. The cause title shows ten defendants As we have indicated, the first three defendants are the sons of the mortgagor. The fourth, fifth, sixth and seventh defendants are the heirs of a subsequent mortgagee. The eighth, ninth and tenth defendants are the heirs of the first defendant who died pending the suit

By a judgment dated the 16th August, 1941, the District Munsiff of Tanjore to whose Court the suit had been transferred, dismissed it. He found on the issues raised by the defendants that the testator was not of sound disposing state of mind when he executed the will, that the will was invalid under the Mahomedan law and that the mortgage deed had in fact been discharged by a payment made to the brother of the testator The plaintiff appealed to the Court of the District Judge, West Tanjore, but the District Judge transferred the appeal to the Court of the Subordinate Judge The appeal was filed on the 20th October, 1941 and was heard on the 2nd October, 1942 The Subordinate Judge gave his judgment on the 16th October, 1942 He found that the testator was in full possession of his mental faculties at the time of the execution of the will, that the will was valid, and that the mortgage debt had not been discharged Defendants 4 to 7 appealed to this Court The appeal was heard by Byers, J ,[1] who allowed it on the ground that the appeal to the Subordinate Judge was not maintainable because at the time of the hearing the plaintiff was an enemy within the meaning of rule 97 of the Defence of India Rules read with rule 2 Between the filing of the appeal in the District Court and the hearing of it by the Subordinate Judge the Japanese had overrun the whole of the Federated Malay States and the Straits Settlement. Singapore was occupied by the Japanese on the 15th February, 1942, but the date of their occupation of Penang has not been given It was some short time before the occupation of Singapore In interpreting the Defence of India Rules which have bearing on the matter the learned Judge placed great reliance on the decision of the House of Lords in *Sovfracht (V/O)* v *Van Udens Schoepvaert En Agentuur Maatschappij (N V. Gebr)*[2] The learned Judge gave a certificate which has allowed the plaintiff to file the present appeal under clause 15 of the Letters Patent

Before examining the provisions of rule 2 and rule 97 of the Defence of India Rules we will look at the provisions of section 83 of the Code of Civil Procedure. This section was not referred to by the learned Judge. It reads as follows :

"(1) Alien enemies residing in British India with the permission of the Central Government, and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts

Explanation—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Central Government shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country "

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1 (1944) 2 M L J. 293 2 (1943) A C 203

The explanation is the important part of the section so far as this case is concerned. The plaintiff is not an alien enemy within the meaning of the section because the Government of the Federated Malay States was not at war with the United Kingdom. The word "Government" must mean the recognised Government of the country. It would be doing violence to the wording of the section to hold that it includes an enemy army in temporary occupation of the country Therefore, so far as the Code of Civil Procedure is concerned, the plaintiff was entitled not only to institute the suit but to proceed with the appeal in the Subordinate Court

The Defence of India Rules are framed under section 2 of the Defence of India Act, 1939 Sub-rule (1) of rule 2 defines "enemy" as any person or State at war with His Majesty Sub-rule (2) defines "enemy territory" as meaning.

"(*a*) any area which is under the sovereignty of, or administered by, or for the time being in the occupation of, a State at war with His Majesty, not being an area in the occupation of His Majesty, or of a State allied with His Majesty and (*b*) any area which may be notified by the Central Government to be enemy territory for the purposes of these rules or such of them as may be specified in the notification"

Rule 97 is the first rule in Part XV, which relates to the control of trading with an enemy. It reads as follows:

"For the purposes of this Part the expression 'enemy' means—

(*a*) any State, or Sovereign of a State, at war, with His Majesty, or

(*b*) any individual resident in enemy territory, or

(*c*) any body of persons constituted or incorporated in enemy territory, or in, or under the laws of, a State at war with His Majesty, or

(*d*) any other person or body of persons declared by the Central Government to be an enemy, or

(*e*) any body of persons whether incorporated or not carrying on business in any place, if and so long as the body is controlled by a person who, under this rule, is an enemy, or

(*f*) as respects any business carried on in enemy territory, any individual or body of persons, whether incorporated or not, carrying on that business"

If the plaintiff is to be regarded as being resident in enemy territory, or carrying on business in such territory, it is accepted that he could not have prosecuted the appeal in the Subordinate Court until after the suspension of the hostilities. Mr. Justice Byers considered that the plaintiff was a resident in enemy territory within the meaning of rule 2 (2) (*a*).

This rule differs in a material respect from the corresponding provision in the English law. The corresponding provision in the English law is section 15 (1) of the Trading with the Enemy Act, 1939 It defines "enemy territory" as meaning "any area which is under the sovereignty of or in the occupation of a power with whom His Majesty is at war" The words "not being an area in the occupation of His Majesty or of a State allied with His Majesty", which appear in the Indian Rule, are not there Under the English Act Penang after its occupation by the Japanese undoubtedly became enemy territory The question then is, what is the meaning to be attached to the words "not being an area in the occupation of His Majesty or of a State allied with His Majesty" to be found in the Indian Rule? In our judgment they can only be read as meaning "not being an area which was in the occupation of His Majesty or of a State allied with His Majesty" The words "not being an area" must have reference to the words "any area" with which the rule opens. Under the rule there are three categories of enemy territory, namely, (*i*) territory which is under the sovereignty of a State at war with His Majesty, (*ii*) territory which is being administered by a State at war with His Majesty, and (*iii*) territory which for the time being is in the occupation of a State at war with His Majesty If the words "not being an area in the occupation of His Majesty" are not to be read in the way we read them, the provision with regard to the territory occupied by the enemy would be meaningless because an area cannot be in the occupation of both at the same time

We are confirmed in our opinion when we look at clause (*b*) of the rule. That clause provides that the Central Government may declare territory in any area to be enemy territory, that means territory in any part of the world. We can only gather the intention of the Government of India in framing these rules from the

wording, and looking at clauses (*a*) and (*b*) of the rule it would appear that the intention of the Government was not to treat territory temporarily overrun by the enemy as enemy territory unless the need should arise We are told that there has been no notification issued declaring Penang to be enemy territory and consequently it must be presumed that there was no necessity for treating it as such.

The same question has arisen twice in cases tried on the original side of this Court by Chandrasekhara Aiyar, J., who came to the same conclusion Those cases are *Thenappa Chettiar* v *Indian Overseas Bank, Ltd* [1] and *Manasseh Film Co.* v. *Gemini Pictures Circuit*[2]

As Penang was not at any time material to this suit enemy territory within the meaning of the Defence of India Rules, the plaintiff was not an enemy and, therefore, the provisions of Part XV of the Rules do not apply to him so far as this case is concerned.

We do not regard the decision of the House of Lords in *Sovfracht (V/O)* v. *Van Udens Schoepvaert En Agentuur Maatschappij (N. V Gebr)*[3], as having real bearing. Not only is the English law different but the facts are different There the respondents, a Dutch company, carrying on business at Rottendam chartered a vessel to the appellants. This was before the outbreak of the war between Britain and Germany in September, 1939. After the war had begun disputes arose between the parties and the respondents sought arbitration in London in accordance with the provisions of the Charterparty. This was in April 1940 The Germans did not invade the Netherlands until May, 1940 After this event had happened the appellants refused to proceed with the arbitration on the ground that the respondents should be treated as alien enemies. In this attitude the appellants were supported by the arbitrator whom they had nominated The result was that on the 24th June, 1941, the respondents took out a summons before the Master asking for the appointment of an umpire The Master appointed an umpire and his decision was upheld by Asquith, J., sitting in chambers The appellants appealed They contended that both under the common law and the Trading with the Enemy Act, 1939, the respondents were not entitled to proceed with the arbitration until hostilities had ceased The Court of Appeal held that the respondents were not alien enemies at common law but that they must be treated as such under the Trading with Enemy Act. During the hearing of the appeal counsel for the respondents intimated that there would be no difficulty in getting the sanction of the Treasury and Board of Trade to permit the arbitration proceeding and the hearing was adjourned to enable them to obtain permission. The Treasury and Board of Trade both gave their sanction and consequently the appeal was dismissed The appellants appealed to the House of Lords. The House of Lords held that under the Act and at common law the arbitration could not be proceeded with during the war. Their Lordships also held that neither the Treasury nor the Board of Trade could with retrospective effect give sanction to such a course The result was that the appeal was allowed and the summons taken out after the invasion of Holland by Germany was dismissed.

We consider that Byers, J., erred in applying the principles laid down in that decision to the present case We have already indicated that if rule 2 (2) (*a*) of the Defence of India Rules had been on all fours with section 15 (1) of the English Trading with the Enemy Act, 1939, the Court would be bound to hold that Penang was enemy territory when the appeal to the Subordinate Judge came on for hearing and therefore could not be proceeded with There is however an important difference between the two enactments and of such a nature that the decision of the House of Lords relating to the Trading with the Enemy Act cannot have bearing here Nor can the common law be applied in the present case The suit was instituted in a mofussil Court Even if the common law had applied it cannot override an Indian statute In *Bank of England* v *Vagliano Bros* [4], Lord Halsbury, L C, pointed out that where a statute is expressly said to codify the law, the Court is not at liberty to

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1 (1943) 2 M L J 201
2 (1944) 1 M L J 58 I L R (1944) Mad. 124.
3 (1943) A C 203.
4. (1891) A C. 107 at 120

go outside the Code because before the existence of that Code another law prevailed. By reason of the provisions of the Code of Civil Procedure the plaintiff had full right to sue and to prefer the appeal from the decision of the District Munsiff

For the reasons given the appeal must be allowed and the case remanded to Byers, J, to decide a question left open, namely, whether the will is valid according to Mahomedan law

The appellant is entitled to the costs of the appeal to this Court The costs of the second appeal will abide the result of the further hearing. The appellant is entitled to a refund of the court-fee paid on the memorandum of Letters Patent Appeal

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE LAKSHMANA RAO

Merla Veeramma, Zamindarini Velangi, represented by general power-of-attorney holder, N Ramayya and others . *Appellants* *

v

Villury Ramanna and another *Respondents*

Madras Estates Land Act (I of 1908, *as amended in* 1934), *sections* 145 (2) *and* 147 (1)—*Purchase from pattadar of lands covered by patta in respect of which rent decree had been passed—Notice of purchase given to landholder—Subsequent sale in execution of the decree without notice to the purchaser—Nullity*

Where after the passing of a rent decree against a pattadar the lands covered by the patta were purchased by a stranger and notice of such sale was duly given to the landholder under section 145 (2) of the Madras Estates Land Act, an attachment and sale of such lands in execution of the rent decree without a notice to the purchaser must be regarded as a nullity and the purchaser cannot be bound by it

Subbarayulu v *Arunachala Nadar,* (1936) 70 M L J 576, approved, *Kanchamalai Pathar* v *Shahaji Rajah Sahib,* (1935) 70 M L J 162 I L R 59 Mad 461 (F B) and *Raghunath Das* v *Sunderdas Khetri,* (1914) 27 M L J 150 L R 41 I A 251 I L R 42 Cal 72 (P C), applied and *Appanna Sastri* v *Raja Sobhanadri,* (1941) 2 M L J 947, disapproved

The fact that the purchaser appeared at the sale and presented a petition asking that if the sale was to take place a figure mentioned by him should be fixed as the upset price, did not obviate the necessity for notice to him and validate the sale

Chandra Nath v *Nabadwip Chandra,* A I R 1931 Cal 476, distinguished

Appeal against the decree of the Court of the Subordinate Judge, Ellore, in A. S. No 248 of 1944, preferred against the decree of the Court of the District Munsiff, Kovvur, in O S No 176 of 1941

Ch. Raghava Rao and *K. V Rangachari* for Appellants

S. Venugopala Rao for Respondents

The Judgment of the Court was delivered by

The Chief Justice—This second appeal has been placed before a Bench for hearing as two judgments of this Court which have bearing on the question of law involved are in conflict The first was delivered by Venkataramana Rao, J, in *Subbarayulu* v *Arunachala Nadar*[1] and the second by Wadsworth, J, in *Appanna Sastri* v *Raja Sobhanadri*[2]

Before turning to the law we will state the facts. On the 30th October, 1937, in S S No 82 of 1937 filed in the Court of the Deputy Collector, Kovvur, under the provisions of section 77 of the Madras Estates Land Act the first defendant obtained a rent decree against a *pattadar* By three sale deeds dated the 18th August, 1937, 7th September, 1937 and 29th March, 1938, respectively, the plaintiffs purchased portions of the land covered by the *patta* Notice of the sales was duly given to the landholder under section 145 (2) of the Act On the 7th February, 1939, the first defendant applied for execution of the decree but he gave no notice of the application to the plaintiffs The lands purchased by the plaintiffs from the original *pattadar* were attached and on the 28th August, 1939, were sold in public

* S. A. No. 2080 of 1944 12th December, 1945

1 (1936) 70 M.L.J 576 2 (1941) 2 M L J 947.

auction The purchaser was the second defendant The plaintiffs then filed in the Court of the District Munsiff of Kovvur the suit which has given rise to this appeal They pleaded that the second defendant had bought the lands as their benamidar and that the sale was invalid for want of notice to them of the execution proceedings. The defendants averred that the second defendant was their benamidar, that notice to the plaintiffs was not necessary inasmuch as they had knowledge of the execution proceedings and that they were estopped from questioning the validity of the sale as the first plaintiff was present at the auction

The District Munsiff held that the second defendant was the benamidar for the first defendant and that the sale was void for want of notice, but the plaintiffs by their conduct were estopped from questioning its validity Consequently he dismissed the suit The plaintiffs appealed to the Subordinate Judge of Ellore. He held that the sale was illegal for want of notice to the plaintiffs and that they were not estopped from questioning the validity of the sale On these findings he decreed the suit The defendants have appealed.

Sub-section (1) of section 145 of the Madras Estates Land Act states that whenever a holding or a portion of it is transferred or whenever it devolves by operation of law, the landholder shall, subject to the provisions of the section, be bound to recognise the transfer or devolution and enter into a fresh engagement. Sub-section (2) says that where a holding or a portion is transferred by the act of a ryot, the landholder on receiving notice in writing from the transferor and the transferee shall recognise the transfer As we have already indicated that notice was given before the execution proceedings were instituted.

Sub-section 1 (*a*) of section 147 says that all acts and proceedings commenced or had under the Act against the transferor or his co-sharers prior to the giving of the notice under sub-section (2) of section 145, in so far as such acts and proceedings affect or purport to affect the land on which the arrear is due, the crops growing thereon and the produce gathered therefrom, shall as against the transferee or co-sharer be as valid and effectual as if such acts and proceedings had been commenced or had against the transferee or co-sharer himself and he had been the defaulter. The section clearly implies that proceedings taken after notice under sub-section (2) of section 145 are invalid if notice is not given to the transferee

The plaintiffs' contention that as notice was not given to them of the execution proceedings they are not bound by the sale is supported by the judgment of Venkataramana Rao, J , in *Subbarayulu* v *Arunachala Nadar*[1] In that case a holding was sold in 1918 to the plaintiff in execution of a mortgage decree obtained against the registered pattadar The plaintiff gave notice of his purchase to the landholder under section 146 of the Madras Estates Land Act by producing the sale certificate before him The landholder recognised the transfer and thereafter received rents from him Before the plaintiff had purchased the property the landholder had obtained a rent decree against the registered *pattadar*. In 1926 he applied for the execution of this decree, giving notice only to the registered *pattadar*. The plaintiff who had been paying rent to the landholder from 1918 onward, was entirely ignored. It was held that in such circumstances the sale was illegal for want of notice and therefore the plaintiff was not affected by it.

The appeal in *Subbarayulu* v *Arunachala Nadar*,[1] was heard before the passing of the Madras Estates Land (Amendment) Act, 1934, which incorporated in section 145 the provisions of section 146, which was consequently omitted from the Act Mr Justice Venkataramana Rao said that under sections 146 and 147 once the transfer had been notified to the landholder either by the notice in writing or by the production of the sale certificate and the transfer had been recognised, the transferee could not be bound by any proceedings commenced thereafter without notice to him He quoted in support of his interpretation of these sections a passage from the judgment of Oldfield and Ramesam, JJ., in *Sri Mahant Prayag Dossjee* v. *Sarangapani Chettiar*[2], where they said with reference to section 146

1. (1936) 70 M.L.J. 576. 2. (1922) 17 L.W. 361.

"We read the section as laying down that where there has been a transfer, whether before the commencement of the Act or after it, the transferee will be entitled to be impleaded in proceedings if he gives the notice which section 146 prescribes but that until he does so, the existing pattadar will still be the person with whom the landholder has to deal"

The facts in *Appanna Sastri* v *Raja Sobhanadri*[1], were these A landholder obtained decrees in two rent suits. At a sale held in execution of the earlier decree a portion of the holding was purchased by the appellant He did not produce the sale certificate before the landholder, but he paid the rent to him and was given a receipt showing that it had been paid on his own account In subsequent years the rent was paid by the appellant's agent, but the receipts wrongly indicated that it was paid on account of the registered *pattadar*. In 1933, the landholder proceeded to execute the second decree which he had obtained in 1924 Without notice to the appellant he brought the holding to sale and purchased it himself Subsequently, the landholder ejected the appellant who filed a suit to recover possession Two contentions were raised in the appeal. One was that the sale was bad for want of notice to the appellant and the other was that the sale was bad because a charge in respect of the arrears which had accrued due after the first decree must be deemed to have been wiped out by the first sale so far as the liability of the portion of the holding sold was concerned

We are here concerned only with the decision on the first question Mr Justice Wadsworth rejected the plea of the appellant that the sale was bad for want of notice, because he considered that there was no necessity under section 117 of the Madras Estates Land Act to give to the defaulter personal notice of a sale in execution of a rent decree The kind of notice contemplated was by beat of drum in the village and by an affixture in a conspicuous place in the village If this had been a case of a sale by a sale officer under the orders of the Collector passed under section 116, we should have agreed with the learned Judge; but the sale was not under that section A landholder has two remedies against a defaulting tenant. He can, if he wishes, file a suit to recover the arrears of rent under section 77 of the Act If the tenant has only defaulted in respect of the current year's revenue the landholder can apply for the sale of the holding under the more summary procedure provided by sections 111 to 131 Section 111 says that when an arrear is not paid within the revenue year in which it accrued due, it shall be lawful for the landholder to sell the holding or any part of it in the manner provided in the Act in satisfaction of the arrear and of interest and costs, if any, of the sale Section 112 states that when the landholder intends to avail himself of the powers given by section 111 he shall serve upon the defaulter through the Collector a written notice stating the amount due for arrears, interest and costs, if any, the period for which and the holding in respect of which it is due and informing him that if he does not pay the amount or institute a suit before the Collector contesting the right of sale within thirty days from the date of the service of the notice the holding or any part specified in the notice will be sold When this notice has been served on the tenant the Collector can take action under section 116 if no suit has been instituted. The section requires the Collector himself to issue notice to all the parties and hear such of them as appear before him When this has been done it is the duty of the Collector to determine the extent of the land to be sold, the lots if any which shall be sold, the order in which the lots shall be sold and the estimated value of each of them He shall then order the sale, appoint an officer to conduct it, draw up the proclamation of sale and direct notice of it in the vernacular of the taluq to be posted in his office and in the taluq office When these formalities have been complied with the selling officer takes charge and conducts the sale

It is quite clear that no further notice is necessary in the case of a sale which has been ordered in accordance with section 116 but it is quite a different matter to say that no notice shall be given to a transferee when there has been a rent suit and the landholder is proceeding in execution of the decree obtained by him therein. Section 145 (2) read with section 147 (1) makes it quite clear that notice is necessary.

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1. (1941) 2 M.L.J. 947.

Where notice is required and is not given, the transferee cannot be affected by anything done behind his back If the property is sold in such circumstances, the sale is invalid In *Kanchamalai Pathar* v *Shahaji Rajah Sahib*[1], a Full Bench of this Court held that a sale was void and not merely voidable where no notice had been served on the legal representatives of the judgment-debtor in accordance with Order 21, rule 22 (1) of the Code of Civil Procedure In *Raghunath Das* v *Sunderdas Khetri*[2], the Privy Council held that a sale in execution which had taken place behind the back of the Official Assignee was void. We consider that the correct view of the law was taken by Venkataramana Rao, J , in *Subbarayulu* v *Arunachala Nadar*[3], which means that the sale complained of by the plaintiffs must be regarded as a nullity

While not suggesting that the doctrine of estoppel applies in this case Mr. Raghava Rao on behalf of the appellants has contended that the plaintiffs did in effect get notice of the execution proceedings He bases his contention on the fact that the day before the sale was due to be held the first plaintiff heard that it had been fixed for the next day. The sale was held at the house of the second defendant and the first plaintiff attended at the time appointed. Before doing so, he handed in a petition to the Deputy Collector in which he said that he was the purchaser of the land and asked that if the sale was to take place the upset price should be Rs. 100 At the sale the property was knocked down to the second defendant whose bid was Rs 110. As he was present at the sale the first plaintiff was asked to sign the list of bidders and this he did It is suggested that his presence at the sale obviated any necessity for notice of the execution proceedings. We cannot accept this contention. The first plaintiff was not served with notice. At the last moment he heard that the sale was going to take place and he did what he considered best for himself in the circumstances This certainly did not validate the sale Mr Raghava Rao has pressed upon us the decision of the Calcutta High Court in *Chandra Nath* v *Nabadwip Chandra*[4], but a perusal of the judgment makes it obvious that it renders no support to the appellants. There notice was not issued to the judgment-debtors under Order 21, rule 22 of the Code of Civil Procedure, but notice was issued under Order 21, rule 66, and in pursuance of that notice they appeared For two years they contested the right of the decree-holder to bring the property to sale. It was only when their objections were finally overruled that they pleaded the absence of notice under Order 21, rule 22 While recognising that where a party entitled to notice under Order 21, rule 22, does not in substance get notice the sale which follows will be without jurisdiction, Rankin, C.J , said on the facts of that case it would be merely piling unreason upon technicality to hold that the sale was not in order. There the judgment-debtors had in effect received notice and had appeared. That is not the case here.

For these reasons we dismiss the second appeal with costs

K S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE LAKSHMANA RAO.

Abdul Kader Rowthen .. *Appellant**

v.

Velu Nayar . *Respondent.*

Malabar Compensation for Tenants Improvements Act (I of 1900), section 3 (1)—Lessee of vacant lands within Municipal limits—Erection of sheds for trade purpose—Eviction of lessee—Value of sheds—Whether can be claimed as an 'improvement'

The Malabar Compensation for Tenants Improvements Act of 1899 does not extend beyond agricultural leases and leases of vacant sites let for the purpose of building houses thereon.

Where the lease of certain lands within Municipal limits was for the purpose of enabling the lessee to carry on his timber trade, and the lessee having put up sheds on the leased land for

1 (1935) 70 M L J 162 I L R 59 Mad 461 (F B)
2 (1914) 27 M L J. 150 L R 41 I A 251 I L R 42 Cal 72 (P C)
3 (1936) 70 M L J 576
4. A I R 1931 Cal 476.

*S A No 423 of 1944 11th December, 1945

purposes of his trade the question was raised whether he was entitled to the value of the sheds as an improvement within the meaning of the Act before he was evicted.

Held, that the Malabar Compensation for Tenants Improvements Act was inapplicable to the case, and that the lessee was not entitled to claim the value of the sheds as an "improvement" within the meaning of the Act

Chathukutty v *Kunhappu*, (1927) 53 M L J 224 I L R 50 Mad 813, *Pathumma Umma* v *A Mohideen*, A I R 1928 Mad 929 and *Avaru* v *Asi Bai*, (1931) 61 M L J 462 I L R. 55 Mad 151, considered

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Palghat, in A S. No. 75 of 1941, preferred against the decree of the Court of the District Munsiff, Palghat, in O. S No. 50 of 1940.

D. A. Krishna Variar for Appellant.

K. Kuttikrishna Menon for Respondent.

This appeal came up in the first instance on 21st September, 1945, before *Somayya, J*, who made the following

ORDER OF REFERENCE.—The question in this case is whether the appellant is entitled to the value of the improvements consisting of sheds constructed for timber trade. The lower Courts refused compensation on the ground that Madras Act I of 1900 does not apply I called for a finding whether the construction of the sheds in question is an improvement within the meaning of the Act The finding is that it is and I see no reason to differ from the finding of the Subordinate Judge on this point. This takes us to the question whether the Act applies at all to a case like this where a vacant land was let out for the purpose of enabling the lessee to carry on his timber trade It is admitted that the lease was for the purpose of the lessee's timber trade and that that includes the erection of structures necessary for carrying on trade. Section 3, sub-section (1) of Act I of 1900 omitting unnecessary expressions defines a tenant as "a person who as a lessee of land is in possession of it" The question is whether the Act is confined to agricultural tenancies and to tenancies of kudiyiruppus or lands let out for the purpose of erecting residential houses for the tenant. The language in section 3, sub-section (1) is quite general and is not confined to agricultural tenancies One view that was pressed very often in cases which came up for decision before this Court is that the Act is confined to agricultural tenancies That view was propounded in an earlier decision of 1889 in S A No 1440 of 1889 Later decisions, however, departed from this view and it was held that the Act is not confined to agricultural tenancies In *Chathukutty* v *Kunhappu*[1], the lease was of a shop belonging to the landlord. On the ground that the lease was not of "A land" Jackson, J, held that the Act did not apply but observed that the Act is not confined to agricultural leases and that it applies to leases of land for building houses for residential purposes In *Avaru* v *Asi Bai*[2], Wallace and Madhavan Nair, JJ, had to consider a case where a land was given to enable the lessee to put up a dwelling house The learned Judges went elaborately into the question whether the Act is confined to agricultural leases and they held that it is not The language used by the learned Judges seems to indicate that in their opinion Act I of 1900 is intended to apply to all cases of leases of land The question that actually arose before them was no doubt one of a lease of a site for building a residential house but the reasoning applies to all leases of lands, *i e*, for vacant sites The question arose again before Reilly and Anantakrishna Aiyar, JJ, in *Paredath Chori George* v *Thithi Umma*[3], Reilly, J, observed that the decision in *Avaru* v *Asi Bai*[2], goes further than the view expressed by Jackson, J, in *Chathukutty* v. *Kunhappu*[1] and said that it was unnecessary for him to go so far as the view laid down in *Avaru* v *Asi Bai*[2] and that as the case before him was in regard to a lease for putting up a residential house, it was enough to say that the leases for kudiyiruppus, that being the terms used for leases of land let out for building residential houses, are also within the Act If the wording of section 3, sub-section (1) is not to be confined to agricultural tenancies and must be taken to apply to other leases of land as well, it is difficult to see how one can get from the Act that non-agricultural leases must be confined to cases of leases for putting up residential houses That will be a further restriction Either the Act must be confined to agricultural leases based upon the supposed general policy of the Act or it must be applied to all cases of leases of land which is the wording of the Act It is in this view that I called for a finding in February last Then it was not brought to my notice that Horwill, J, had decided that the Act applied only to agricultural leases and to leases of kudiyiruppus That decision is reported in *Successor and Joint Manager Pandan Chemmaniyam Achuthan* v *Pandan Govindan Karnavan and Manager of the Tavazhi Tarwad of Chirakkal amsom desom*[4] The learned Judge was pressed with the views expressed by Wallace and Madhavan Nair, JJ, in *Avaru* v. *Asi Bai*[2], but the learned Judge thought that reading the judgment as a whole, Wallace and Madhavan Nair, JJ, intended to confine their remarks to cases of leases of lands granted for erecting residential houses Mr Krishna Variar has taken me through the judgment very elaborately and very carefully and I find that there is great force in his criticism that the learned Judge's view was that it applies to all cases of leases of land, not merely to agricultural tenancies and kudiyiruppus In fact this is how Reilly J, viewed the decision of Wallace and Madhavan Nair, JJ In my opinion, the question to be decided is·

"If the Act is not to be confined to agricultural leases, whether there is any reason to extend it only to leases of land let out for kudiyiruppus"

The expression used is "a person who as a lessee of land is in possession thereof"

1. (1927) 53 M.L J. 224 : I L R. 50 Mad 813
2. (1931) 61 M.L J. 462 . I.L.R. 55 Mad 151.
3. (1930) 60 M L J 214.
4. (1945) 1 M.L.J. 240

I have not heard Mr Kuttikrishna Menon, but he tells me that there is no other decision in point except that of Horwill, J As I think that this is a case in which it is desirable that a Bench of this Court should decide the question I direct the papers to be placed before the learned Chief Justice for necessary orders

On this reference the appeal came up before the Bench as constituted above and the Court delivered the following

JUDGMENT *The Chief Justice* —The appellant is a trader in timber. On the 14th January, 1937, he acquired a lease from the respondent of a small piece of land at Olavakode in the Palghat Municipality His object in taking the lease was to store timber on the land When he entered into occupation he erected three sheds. The landlord had the right to determine the tenancy on demand, and required the tenant to vacate in the early part of 1940 As his demand for possession was not complied with he filed a suit for ejectment in the Court of the District Munsiff of Palghat The appellant pleaded that he could not be evicted until the respondent had paid to him the value of the three sheds as they had been erected with the knowledge and consent of the respondent. This plea was rejected by the District Munsiff who granted a decree for ejectment without requiring the respondent to make any payment on account of the structures. The appellant appealed to the Subordinate Judge of South Malabar. In that Court the respondent based his claim for compensation on the provisions of the Malabar Compensation for Tenants Improvements Act, 1899. The Subordinate Judge held that the Act did not apply and dismissed the appeal The appellant then appealed to this Court. In the first place the case came before Somayya, J , who called for a finding from the Subordinate Judge on the question whether the erection of the sheds constituted an improvement to the land The Subordinate Judge reported that it did. Somayya, J , then directed that the case should be placed before a Bench for hearing as the extent of the application of the Malabar Compensation for Tenants Improvements Act was in dispute

The effect of the Act has been raised in several cases which have come before this Court and it is necessary for the purpose of deciding this appeal to examine them in detail We propose to take them in the order of date but before doing so we must refer to the relevant sections of the Act.

The word "tenant" is defined in section 3 and includes a person who as lessee, sub-lessee, mortgagee or sub-mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee or sub-mortgagee of land is in possession The section also defines the word "improvement" It means any work or product of a work which adds to the value of the holding, is suitable to it and consistent with the purpose for which the holding was let, mortgaged or occupied. Section 4 states what shall be presumed to be improvements for the purposes of the Act until the contrary is shown They are as follows

(*a*) The erection of dwelling houses, buildings appurtenant thereto, and farm buildings ; (*b*) the construction of tanks, wells, channels, dams and other works for the storage or supply of water for agricultural or domestic purposes ; (*c*) the preparation of land for irrigation ; (*d*) the conversion of one-crop into two-crop land , (*e*) the drainage reclamation from rivers or other waters, or protection from floods or from erosion or other damage by water, of land used for agricultural purposes, or of waste land which is culturable ; (*f*) the reclamation, clearance, enclosure or permanent improvement of land for agricultural purposes ; (*g*) the removal or reconstruction of any of the foregoing works, or alterations thereon or additions thereto , (*h*) the planting or protecting and maintenance of fruit trees, timber trees and other useful trees and plants Section 5 entitles a tenant to compensation for "improvements" when he is ejected from the land

The first case in which the scope of the Act was discussed by this Court is *Chathukutty* v. *Kunhappau*[1]. It was a second appeal which was heard by Jackson, J. There the plaintiff had let to the defendant a shop in a town in Malabar for five years, the tenant agreeing to remove a bakery oven erected by him therein when

1 (1927) 53 M.L.J. 224 . I.L.R. 50 Mad. 813

surrendering the shop at the end of the period On the expiration of the tenancy the plaintiff sued to recover arrears of rent and possession of the property The defendant pleaded that he was entitled under the Act to compensation for the oven before being ejected The learned Judge held that it was entirely foreign to the intention of the enactment to hold that because a house or shop must necessarily stand upon land, therefore, whenever a house or a shop was leased the tenant was the lessee of land within the meaning of the statute. As far as his knowledge went it had invariably been held in Malabar that the Act applied to agricultural holdings and to what were known as kudiyiruppus or vacant sites available for buildings and did not apply to sites which were already mainly occupied by houses or shops. The opinion of Jackson, J, that the Act only applies to improvements effected in agricultural holdings and vacant sites built upon when let for that purpose has found favour in subsequent decisions of this Court

In *Pathumma Umma* v *A Mohideen*[1], Srinivasa Ayyangar, J, expressed the same opinion; but Reilly, J, who sat with him did not consider that the case then under discussion called for any expression of opinion. Ananthakrishna Aiyar, J, followed *Chathukutty* v *Kunhappu*[2] in *Sabju Sahib* v. *Malabar District Board*[3]

The case which has been relied upon by the appellant is *Avaru* v *Asi Bai*[4], which was heard by Wallace and Madhavan Nair, JJ The question there was whether the operation of the Act was restricted to agricultural leases or whether it extended to leases of vacant sites let for the erection of houses. The learned Judge held that the Act was not restricted to agricultural leases, but embraced building leases as well It is said that there are indications in the judgment that the Court was of the opinion that the Act applied to all tenancies in Malabar; but we find ourselves unable to accept this contention In our opinion the learned Judges did not intend to go beyond holding that the Act applied to leases of vacant sites for the purpose of the erection of houses thereon by the tenants as well as to agricultural tenancies After an examination of Act I of 1887 (the Malabar Compensation for Tenants Improvements Act, 1886), the custom in Malabar and the decisions of this Court bearing on the subject the learned Judges stated their conclusion in the following words

> "For the above reasons, we are of opinion that the operation of Act I of 1900 is not restricted to agricultural tenancies that it applies to building leases as well, that in this view it is unnecessary to consider what the law was prior to 1900 and that, even if it is necessary to refer to the prior law on the ground that the words of the statute are not very clear, the law administered in Courts without any question for over a century has always been to the effect that in Malabar the tenant of a vacant site is always entitled to claim compensation for dwelling houses that he may have erected on the site"

In the judgment reference is made to "building leases". but it is obvious that this expression does not mean leases of land for any kind of building but only for the building of dwelling houses.

The judgment in *Avaru* v *Asi Bai*[4] was followed by Reilly and Anantakrishna Aiyar, JJ, in *Paredath Chori George* v *Thithi Umma*[5], but Reilly, J, refused to decide whether a tenant to whom a building was let could claim compensation for improvements made, on the ground that the building itself must stand upon land and therefore he was a tenant of land within the meaning of the Act. That question was, however, decided by another Division Bench (Venkatasubba Rao and Horwill, JJ.) in *Badsha Sahib & Co* v *Lakshmi Kutty*[6], where it was expressly held that a lessee of a shop was not a lessee of the land and therefore he was not a tenant within the meaning of the Act. It may be mentioned that in the course of the judgment in that case the decision of Jackson, J, in *Chathukutty* v *Kunhappu*[2] was expressly approved

The latest case is *Successor and Joint Manager Pandan Chemminiyam Achuthan* v *Pandan Govindan Karnavan and Manager of the Tavazhi Tarwad of Chirakkal amsom desom*[7], where Horwill, J., also held that the application of the Act was confined to improvements made in regard to agricultural lands and to kudiyiruppus.

1. A I R. 1928 Mad 929
2. (1927) 53 M L J 224. I L.R 50 Mad. 813
3. (1929) 57 M L J 673. I.L.R 53 Mad. 54
4. (1931) 61 M L J. 462 · I.L.R. 55 Mad 151.
5. (1930) 60 M L J 214
6. (1937) 2 M.L J 814 I.L.R (1938) Mad. 763
7. (1945) 1 M.L.J. 240.

It will be seen that the judgment of Jackson, J, in *Chathukutty* v. *Kunhappu*,[1] has not in any case been dissented from and that it has been expressly approved by three Division Benches of this Court. Those decisions are binding on us and we may add that we respectfully agree with them. To extend the Act to all kinds of leases would, in our opinion, mean running counter to the scheme of the statute and the clear indication of its scope expressed in section 4 Moreover, it must be remembered that the Act of 1900 followed the Act of 1886 which only applied to agricultural leases The old Act was passed by the local legislative council which at the time had no power to deal with leases other than agricultural leases It had power to legislate with regard to agricultural leases as they were outside the scope of the Transfer of Property Act. When the Malabar Compensation for Tenants Improvements Act, 1899, was passed the local Legislature had power to legislate in respect of other tenancies but the wording of the Act leaves no doubt in our minds that it was not intended that the extension of the provisions of the old Act should go beyond leases of vacant sites for the building of dwelling houses. The Legislature was merely placing on the statute what had been the custom with regard to leases of vacant house sites If the appellant's argument were to be accepted it would mean that a person who acquired a lease of a vacant site could erect thereon any kind of building, even a factory, and claim compensation on the termination of the tenancy It would also mean that the Transfer of Property Act would not be applicable to any leases in Malabar so far as improvements were concerned We hold that the Act does not extend beyond agricultural leases and leases of vacant sites let for the purpose of building dwelling houses thereon.

It follows that this appeal must be dismissed with costs The appellant is of course entitled to remove the structures and he will be allowed two months' time for this purpose.

B.V V —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE WADSWORTH AND MR JUSTICE RAJAMANNAR.

T Raju Aiyar . *Appellant**

v.

Gnanambal Ammal and others *Respondents.*

Will—Construction—One clause referring back to another clause—Provisions for several contingencies—Importing the provisions of one contingency when another has come into effect—Propriety

One *K* died leaving a will providing for three contingencies (*i*) It authorised the widow to adopt any son who might be born to the daughter of *K* in which case among others clause (5) of the will, *viz*, "the whole village of Kothangudi and the house at Injikudi both of Nannilam taluk, my daughter Nagammal shall enjoy with life interest and after her the said property shall pass to my daughter *G* and her children on payment by the latter of Rs 5,000 to *A*, Nagammal's daughter" came into effect (*ii*) It authorised the widow to adopt any of the testator's nephews in which case clause (13) among others, *viz*, the village of "Kothangudi shall be enjoyed by Nagammal as stated in paragraph (5)" came into effect (*iii*) The third contingency was when no adoption was made The second contingency having happened, on Nagammal's death, on the question of the further devolution of the property, the village of Kothangudi,

Held, that as clause (13) refers to only one item of property and clause (5) refers to two items and as the proviso in clause (5) for the payment to *A* of Rs 5,000 as a condition precedent to *G* and her children taking the two properties cannot be read into clause (13), clause (13) cannot draw into itself the provisions in clause (5) for the devolution of either of the properties on the death of Nagammal An intestacy with reference to the village of Kothangudi having arisen the adopted son of *K* is entitled to it

Sweeting v *Prideaux*, (1876) 2 Ch D 413, *Ross* v *Ross*, (1845) 2 Coll 269 63 E R 730 and Re *Shirley's Trusts*, (1863) 32 Beav 392 55 E R 154, referred to

Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in O S No 34 of 1943.

T. V Muthukrishna Aiyar and *R Vaidyanatha Aiyar* for Appellant

Sir A Krishnaswami Aiyar, S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Respondents

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1 (1927) 53 M L J. 224 · I L R. 50 Mad 813.

* Appeal No. 518 of 1944 27th November, 1945.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellant sued for a declaration that he was entitled to the village of Kothangudi as the adopted son of Kothandarama Ayyar and claimed possession in consequence of the death on 3rd January, 1943, of Nagammal, the daughter of Kothandarama Ayyar, to whom the property was given for life under Kothandarama Ayyar's will dated 13th March, 1905. The testator Kothandarama Ayyar died on the 25th April, 1905, leaving a widow and two daughters, Gnanambal, who is the first defendant and whose husband was then alive, and Nagammal, who was a widow with a daughter who is the second defendant The main question in this appeal relates to the interpretation of clause 13 of the will which runs as follows :

"The village of Kothangudi shall be enjoyed by Nagammal as stated in paragraph 5"

The appellant contends that this merely indicates that Nagammal is to have a life interest. The respondents contend that this clause, by the reference to paragraph 5, imports the provisions in that paragraph relating to the devolution of the property after Nagammal's death.

The scheme of the will is to provide for three possible contingencies. It authorises the widow to adopt (1) any son who might be born to Gnanambal before January, 1908 or (2) any of the sons of the testator's nephews. Then follow clauses 4 to 8 which make detailed provisions for the devolution of the property in case a son of Gnanambal should be adopted. Clauses 9 and 10 are general provisions regarding the payments of debts and the maintenance of charities Thereafter clauses 11 to 16 provide for the contingency of the widow making an adoption of one of the testator's nephews, in which case the dispositions of the property are to be different in many respects from those prescribed if there is an adoption of a son of Gnanambal. Finally, there are certain general provisions and there is the third contingency provided for, namely, the death of the widow of the testator without making an adoption.

The testator left very considerable properties. Clause 5 of the will with which we are mainly concerned, having regard to the reference to it in clause 13, runs as follows :

"The whole village of Kothangudi and the house at Injikudi both of Nannilam taluk, my daughter Nagammal shall enjoy with life interest and after her the said property shall pass to my daughter Gnanam and her children on payment by the latter of Rs 5,000 to Alamelu, Nagammal's daughter"

This portion of the will never came into effect *per se*, for the plaintiff-appellant, son of one of the testator's nephews, was adopted by the testator's widow on the day after the testator's death, so that the operative portion of the will is that which provides for the contingency of the adoption of the son of one of the nephews In this event, under clause 11 the adopted son is to take the whole of the properties at Kokkur and the remainder of the properties at Nallathukudi after the death of the wife and adoptive mother who are given a life interest in paragraphs 15 and 16. In clause 12 the whole village of Maruthanathanallur is given for life to Gnanam with remainder to her children. Then follows the disputed clause 13 giving Kothangudi to Nagammal to be enjoyed as stated in paragraph 5 Clause 14 provides that the properties given to the two daughters shall be managed by the testator's wife during her lifetime and that the wife shall attend to the wants of the daughters and their children such as making jewels, etc and the marriage of Alamelu

Nagammal having died on 3rd January, 1943, the appellant contended that there was an intestacy with reference to the village of Kothangudi given to her for life by this will and that he was therefore entitled to possession. The lower Court repelled this contention and held that the words "shall be enjoyed by Nagammal as stated in paragraph 5," read in the light of the rest of the will, must be understood as importing into paragraph 13 the whole provisions of paragraph 5 regarding the devolution of the property after Nagammal's death, including the provision for the payment of Rs. 5,000 to Alamelu, daughter of Nagammal. It is contended by Mr. Muthukrishna Aiyar for the appellant that this interpretation of the will is

in fact the making of a new will, by the importation of this provision which the testator omitted from his will, on a mere conjecture as to what the testator is likely to have intended. It is argued that however regrettable it may be that there was no provision for the devolution of this property after the death of Nagammal, and even though if the testator's attention had been drawn to the omission, he might have intended to make a provision for the benefit of his daughters and their children similar to that contained in paragraph 5, it is not permissible to introduce into the will this provision which the will does not contain, merely on a speculation as to the intentions of the testator, having regard to his affectionate attitude towards his daughters. Mr. Muthukrishna Ayyar also raises a doubt whether any such intention can in fact be gathered as a matter of reasonable speculation from the will. He points out that under clause 12 of the will Gnanambal and her children get the biggest village of Maruthanathanallur, which under the scheme in the earlier part of the will, which would have come into force had Gnanambal's son been adopted, would have gone to the adopted son. The argument is that we cannot presume that the testator intended not only to give to Gnanambal and her children the village of Maruthanathanallur, but also to give her the remainder in the village of Kothangudi which she was to get under the first contingency.

On the other hand, it has been contended for the respondents that the will shows that the testator was chiefly interested in his daughter Gnanambal who might be expected to have a son in the future, that the will purports to be a comprehensive disposition of all the testator's properties and to cover every possible contingency and that it is not likely that the testator would have omitted to provide for the devolution of part of his estate in the event of the second contingency coming into force. Sir Alladi Krishnaswami Aiyar has drawn our attention to the other clauses in the second part of the will which contain references to paragraph 6 of the will and has pointed out that where there is any departure in those clauses from the provisions for the subsequent devolution of the property in paragraph 6, a specific indication is given regarding what is to happen after the death of the life tenants; and it is pointed out that in clause 13, which refers back to clause 5, there is no specific indication of any subsequent devolution of property in a manner different from that indicated in paragraph 5. Emphasis is also laid upon the fact that if the whole of paragraph 5 is read into paragraph 13, there will be an equitable provision for Nagammal's daughter Alamelu after her mother's death since she is to get Rs. 5,000. If, however, the later portion of paragraph 5 is not to be read into clause 13, Nagammal's daughter will get nothing, unless some provision has been made for her marriage under clause 14.

All these considerations are matters which may well be taken into account if the words of paragraph 13 of the will are reasonably capable of two meanings and the question is which of those two meanings should be adopted. If, however, the words of paragraph 13 are clear and unambiguous, there can be no question of research into the probable intentions of the testator in order to add to those words. For the respondents Sir Alladi Krishnaswami Aiyar has relied on certain cases, three of which seem to us to come somewhere near to the facts with which we have now to deal. Sir Alladi's general proposition is that where one clause of the document refers back to another clause and in general terms incorporates the provisions of that other clause into itself, the words which refer back to the earlier clause should be read in such a way as to carry out the manifest intentions of the testator and should not be so narrowed down as to defeat those intentions.

In the case of *Sweeting* v *Prideaux*[1], the testator directed his trustees to pay the income of £8,000 to his daughter *A* for life for her separate use and after her death to divide this sum of £8,000 amongst her children at 21 years of age. He then directed his trustees to pay the income of the remaining £8,000 to his other daughter *S* for life "in the same manner in every respect and subject to the same control" as he had directed as to his daughter *A*. The question was whether, there being no specific provision that the children of *S* should take the fund on the

1 (1876) 2 Ch D 413.

mother's death and she having died leaving four children who had attained majority, those children were entitled to the fund of £8,000 The judgment quotes the observations of Lord Justice Knight Bruce in *Key* v *Key*[1] with references to cases in which " it is impossible for a reasonable being upon a careful perusal of an instrument not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed " ; and it goes on to hold that in the case then under consideration the will shows a clear intention to treat the two daughters alike and that it was impossible upon a fair construction of the will, to exclude the children of *S* from having the benefit of the fund It must be pointed out with reference to the rather general nature of the observations in the judgment that the particular will contained a general indication that the property which went to *S* should be treated in the same manner in every respect as the property which went to *A*

Another case upon which Sir Alladi relied is the case of *Ross* v *Ross*[2]. That was a case in which the testator bequeathed two sums which were to be divided amongst his nieces " under the same conditions and restrictions as are hereinafter mentioned respecting the several bequests hereinafter mentioned to them respectively given " Then followed a provision that another sum should be held by the trustees upon trust to pay the dividends to the testator's three nieces for their lives, and after their respective deaths, to transfer the capital to the children of the nieces and there were limitations over, in the nature of cross remainders, in the event of any of the nieces dying without children, and an ultimate limitation, in the event of all the nieces dying without children, in favour of the residuary legatee. The question was whether in respect of the first bequest the children of the nieces of the testator could take the same interest as was specifically given to them in the subsequent bequests which were referred to under the earlier bequest It was held that the words " under the same conditions and restrictions as are hereinafter mentioned " were sufficiently wide to give to the children of the nieces the interest in the fund which their mothers took, absolutely Here again we have two provisions in favour of the same set of individuals, one to be subject to the same conditions as the other and it was held that on the wording of the first provision, there was a manifest intention that the fund should subsequently devolve in the same way as that dealt with in the later provision

A further case of the same kind is Re *Shirley's Trusts*[3] In that case there was a settlement under which the trustees were to raise £2,000 for *A* for life, with remainder to her children with powers for maintenance, advancement or otherwise, and in default of children, the fund was given to *C* A like sum was given to *B* for life, with remainder to her children, " with the like provision for the maintenance and otherwise as before expressed," in respect of £2,000 given to *A* and her children " and otherwise in like manner to all intents and purposes, as if such trusts and provisions were there fully repeated " It was held that this provision with reference to the sum given to *B* for life must be deemed to have included a gift over to *C* and that on the death of *B* without children, *C* was entitled to the second fund This again is a case where on the wording of the will there was a clearly manifest intention that the second provision should import into itself the details of the first provision.

Can it be said on an examination of the present will that there is a clear intention that all the provisions of paragraph 5 should be imported into paragraph 13 of the will? In terms, paragraph 13 only purports to deal with the enjoyment of the village of Kothangudi by Nagammal, the manner of that enjoyment to be as stated in paragraph 5 It seems to us that there is one very obvious difficulty in holding that the terms of paragraph 13 attract the whole of the terms of paragraph 5 Paragraph 13 purports to deal only with the village of Kothangudi Paragraph 5 deals not only with the village of Kothangudi but also with the house in Injikudi which is not referred to in paragraph 13 Moreover the later part of paragraph 5

1 (1853) 4 De G.M. & G 73 at 84 43 E.R. 435.

2 (1845) 2 Coll 269 63 E R 730

3 (1863) 32 Beav 392 55 E R 154.

provides not merely for the remainder in the village of Kothangudi, but also for the remainder in the house at Injikudi and it contains a provision whereby these two properties shall be taken by Gnanambal and her children subject to an obligation to pay a sum of Rs 5,000 to Nagammal's daughter Now clearly if this payment of Rs. 5,000 was to be made a condition precedent to taking the two properties, it would be difficult to attach such a condition to the taking of only one of those two properties; and clearly, seeing that paragraph 5 is a provision which creates a life estate in favour of Nagammal in two properties, paragraph 13, which does not mention the second property could not be said to have given a life estate in that second property to Nagammal without further words than those which we actually find. It has been suggested that the house at Injikudi is a small property which is merely regarded as an appurtenance to the village of Kothangudi. We have no evidence before us regarding the value of the Injikudi house; nor have we any evidence as to the distance between the village of Injikudi and the village of Kothangudi. All that we know is that they are situated in the same taluk. The plaint expressly reserves the right of the plaintiff "to sue separately for the house in Injikudi village which is not in the possession of the defendants." This reservation is met in the written statement of the second defendant with the averment that "the reservation in respect of the house at Injikudi village is unsustainable." These pleadings at any rate seem to suggest that the house at Injikudi is not in the contemplation of the parties a mere appurtenance to the village of Kothangudi. Having these considerations in mind, it seems to us that when paragraph 13 says that the village of Kothangudi shall be enjoyed by Nagammal as stated in paragraph 5, it clearly does not purport to give the house at Injikudi to Nagammal. And if so much is established, it seems to follow that the last clause which provides for a payment to Alamelu of Rs. 5,000 as a condition precedent to Gnanambal and her children taking the two properties, cannot be read into paragraph 13. And if the condition on which under paragraph 5 Gnanambal and her children were to take the remainder in these properties cannot be attracted to paragraph 13, it seems to us to follow that paragraph 13 cannot draw into itself the provision for the devolution of either of these properties on the death of Nagammal.

In this view we do not think it necessary to refer to the other cases which have been cited before us, most of which are general cases regarding the well-established principles of the interpretation of documents. Nor do we think it necessary to go into a contention which does not appear to have been argued in the lower Court, that the will itself would be invalid because the adoption would date back to the death of the testator so that the whole estate will be taken by the adopted son by survivorship. As was pointed out when this contention was adumbrated, if the plaintiff cannot take under the will, his claim would be hopelessly barred by limitation.

In the result, therefore we allow the appeal with costs throughout and give the plaintiff a decree as prayed for. The question of mesne profits will be the subject of separate enquiry in the lower Court.

V.P S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

N. Ramarathnam and another .. *Petitioners.**

Criminal trial—Charge of sedition—Trial by sessions with jury—Grounds for directing.

Though the law has not made a case of an offence under section 124-A of the Penal Code triable exclusively by a Court of Session, where the article in a widely circulated newspaper alleged to be seditious, is in Tamil a trial of the case with the aid of a jury will be advantageous not only from the point of view of the accused but also from the point of view of the prosecution. The main considerations which ought to weigh in deciding such a matter are :

(1) The advantages of a trial by a High Court with the aid of a jury which would be in a position to know the language and appreciate the significance of the article, its implications and its effect on the general public and the readers' reaction to it,

* Cr R. Case No 1169 of 1945. 15th January, 1946.
(Cr. R. P. No 1085 of 1945).

(2) the adequacy of the sentence that may have to be passed by the Court for the offence in question, and

(3) the capacity of the Judge to appreciate the impression that is likely to be formed in the minds of the reading public.

Emperor v *Krishnaji Prabhakar*, (1929) I. L. R 53 Bom 611 and *Emperor* v *Hari Moreshwar*, (1931) I.L R. 56 Bom 61, referred to

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Chief Presidency Magistrate, dated 19th December, 1945, in C C. No. 3255 of 1945.

Sir Alladi Krishnaswami Aiyar for *T. M. Kasturi* and *N. Rajagopala Ayyangar* for Petitioners.

The Crown Prosecutor (*P. Govinda Menon*) for the Crown.

The Court made the following

ORDER —It is urged for the petitioners that there are various considerations which have to be borne in mind by the Chief Presidency Magistrate before deciding whether he should himself try a case of sedition or should commit it to this Court for being tried with the aid of a jury and that the Magistrate has not dealt with or considered them before passing the order sought to be revised In the petition filed before the Magistrate, the main point urged was that the offending article being in Tamil, it would be conducive to the ends of justice if the case is to be tried by a jury, a majority of whom would be in a position to decide whether the article was one that would bring or attempt to bring into hatred or contempt or excite disaffection against the Government He has not specifically dealt with this but merely stated that since most of the cases under section 124-A of the Indian Penal Code would be of the same nature as the case before him, and since the law has not made the offence triable exclusively by a Court of Session, it was evident that such cases need not necessarily be tried always by a Sessions Court. The magistrate was perfectly justified in saying that since the Legislature has not directed that sedition cases should be tried solely by a Sessions Court, he would be entitled to try it But then he has not dealt with the grounds urged in this particular case as to why they wanted the case to be tried in this Court with the aid of a jury As urged by the learned counsel for the petitioners, there are several circumstances which have to be taken into consideration before deciding the question whether this case is to be tried by this Court or by the Chief Presidency Magistrate himself. The main test in such case is the impression formed on the mind of a reader who knows the language in which the article is written The mother tongue of the magistrate is Urdu and it is stated that he has passed a test in Tamil and that he has served in Tamil districts I am not sure whether this knowledge of Tamil would be sufficient to enable him to understand the article with all its implications and to consider and decide what impression it is likely to create upon the Tamil reading public. Of course he would have the help of the translators, but having read the article myself, I think, it is a case in which there are a number of points which will have to be taken into consideration and those points will be better considered by persons who know Tamil and who have got a very good working knowledge of that language. A trial of this case with the aid of a jury will I think be advantageous not only from the point of view of the accused but also from the point of view of the prosecution.

Apart from this, there is also the fact that it is a serious offence with which the accused are charged and it is stated that the paper has a wide circulation. These two grounds were said to constitute enough valid grounds for a case of sedition to be committed to a Court of Session at Bombay instead of being tried by the Presidency Magistrate there. (See *Emperor* v *Krishnaji Prabhakar*[1].) *Emperor* v. *Hari Moreshwar*[2] was a case from the mofussil in which the question was whether the accused should be tried by a Magistrate or by a Sessions Judge, who would be ordinarily helped by assessors

1. (1929) I.L.R. 53 Bom. 611.
2. (1931) I.L.R 56 Bom. 61.

It is also significant that it does not appear from the order of the Magistrate that he had occasion to consider about the adequacy of the sentence that could be passed by him nor does it appear from the order that he has come to his conclusion with reference to any information given to him as regards the gravity of the offence or the sentence that may have to be imposed on the petitioners. The order is silent on that point

The main considerations which ought to have weighed with the Chief Presidency Magistrate in this case are .

(1) The advantages of a trial by a High Court with the aid of a jury which would be in a position to know the language and appreciate the significance of the article, its implication and its effect on the general public and the readers' reaction to it ;

(2) the adequacy of the sentence that may have to be passed by the Court for the offence in question ; and

(3) the capacity of the Judge to appreciate the impression that is likely to be formed in the minds of the reading public.

None of these matters have been dealt with and all that is stated is that a case of sedition could be tried by a Magistrate as well and all cases of sedition are alike and that therefore it will not be justified in committing the case to the High Court

The reasons urged for the petitioners in the petition are sufficient to justify the accused being tried not only by a Judge who knows Tamil but also with the aid of a jury who know Tamil, and this advantage could be had by the accused being committed to this Court if a *prima facie* case is made out I accordingly find that the Magistrate would have done well to have exercised his discretion in recording the evidence as if it was a preliminary enquiry for ultimately committing the case to this Court, if a *prima facie* case should be made out.

It is stated by the learned Crown Prosecutor that the entire evidence has been recorded in writing but that the signatures of the witnesses have not been obtained as would be necessary in a preliminary enquiry This defect as the learned counsel for the petitioner concedes can be cured by the Magistrate sending for the witnesses who are all local men and getting their signatures and certifying that the evidence had been properly read out and explained to them in vernacular and acknowledged by them to be correct.

The petition is accordingly allowed and the Magistrate shall proceed with the case in the light of the observation made above.

K.S ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE BELL.

Ponnuswami Chettiar .. *Petitioner**

v.

Mariappa Pannady . *Respondent.*

Court-Fees Act (VII of 1870 as amended), Schedule II, Article 17-A—Forged document partly forged—Suit for declaration of invalidity—Court-fee payable—Cancellation of deed if necessary

The plaintiff alleged that he entered into a sale deed with the defendant which was drawn up on seven pieces of papers numbered consecutively He further alleged that the defendant who drafted the deed abstracted one of the pages and fraudulently substituted another page instead, and that the document was registered in spite of his objection The plaintiff sued for a declaration that the document purported to have been executed by him to the defendant was void and of no legal effect

Held, that the plaintiff was entitled to sue for the declaration prayed for and pay court-fee under Article 17-A of Schedule II of the Court-Fees Act, as amended in Madras, and that the suit need not be stamped as for cancellation of a document under section 7 (iv-A) of the Act

Kattiya Pillai v *Ramaswamia Pillai*, (1929) 56 M L J 394 and *Nagabhushanam* v *Venkatappayya*, (1934) 68 M L J 95 I L R 58 Mad 448, relied on

* C. R. P. No. 669 of 1945 21st December, 1945.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Coimbatore, dated 12th April, 1945, in O.S. No. 82 of 1944.

A. Swaminatha Aiyar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *S. Ramachandra Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—This petition arises out of a question of court-fee. The circumstances are, one hopes, unusual The plaintiff says that he entered into a sale deed with the defendant which was drawn up on seven pieces of papers numbered consecutively. The defendant apparently drafted the document and according to the plaintiff was clever enough to make each page complete in itself so far as the language is concerned. Then before he presented the document for registration he abstracted page 5 which contained a most material clause in favour of the plaintiff. I am told that the plaintiff objected but the registrar nevertheless registered the document. The plaintiff apprehends that it may be used against him in the future. He has therefore filed a suit setting out these allegations and specifying the alleged fraud of the defendant. In the prayer he asks for the following relief:

> "The plaintiff prays the Court to pass a decree declaring that the document dated 17th November, 1943, purporting to have been executed by the plaintiff to the defendant and registered on 17th February, 1944, is void and of no legal effect."

In the lower Court and here the plaintiff contends that his suit is one for a declaration only and that he asks for no consequential relief. The suit should therefore be stamped in accordance with Article 17-A, Schedule II of the Court Fees Act, the appropriate fee being Rs. 100. On the other hand, it is contended that the suit is in essence one for cancellation of a document and should be stamped in accordance with section 7 (*iv*-A), namely, according to the value of the subject-matter of the suit.

The matter is not free from difficulty and there are a great many conflicting decisions, but so far as this Court is concerned I think that the true view is expressed quite clearly in *Nagabhushanam* v. *Venkatappayya*[1], a decision of Venkatasubba Rao, J. In that case the plaintiff said that a certain sale deed had been forged and he prayed that the instrument might be declared to be a forgery. Venkatasubba Rao, J., said:

> "When a person impeaches a deed as having been forged to refer to him as being a party to it, is an obvious misuse of words"

The facts are not quite the same here because the plaintiff admits that pages 1, 2, 3, 4, 6 and 7 are genuine and were initialled or signed by him. He says, however, that to represent those pages alone as being the true deed is wrong and that he was not a party to whatever may be thought to be represented by those particular pages.

Because a man's name or initials appear on some but not all of the pages of a contract it does not make him a party to it. I think that the plaintiff here is entitled to impeach this document and to pray in aid section 39 of the Specific Relief Act. This section provides that:

> "any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled."

Now here the plaintiff says that the document as it subsists is not what he agreed to. He says that he purchased the properties concerned from someone else's widow and litigation at the instance of reversioners is threatening. The object of including the term of page 5 was to protect him agianst any such attack and to provide that the defendant should assume the burden of resisting such litigation. The provisions of section 39, therefore, seem to be applicable, and the plaintiff merely asks that the document shall be declared void.

1 (1934) 68 M.L.J. 95 : I.L R. 58 Mad. 448.

In the case above cited Venkatasubba Rao, J., deals with section 39, and, referring to a previous decision of a Bench of which he was a member, he says that the plaintiff is entitled to ask merely for a declaration that the document is void. The fact that the Court may go on to order it to be cancelled and will in such case send directions to the registration officer is not a matter for the plaintiff to request but the duty of the Court to grant. In Pollock and Mulla's text book on the Specific Relief Act the learned authors appear to think somewhat differently and to declare that even if the plaintiff merely prays for a declaration that the document is void, nevertheless, the suit is in no sense merely declaratory. With respect, I prefer the Bench case referred to by Venkatasubba Rao, J., namely, *Kattiya Pillai* v. *Ramaswamia Pillai*[1] and the learned Judge's own observations.

In a case such as this where a plaintiff finds himself to have been deliberately deceived, if such be the case, it would appear to be unjust that in seeking to put matters right he should have to find the market value of the property, whatever it be, on the day on which he files his plaint.

For these reasons, I think that the court-fee should be paid under Article 17-A, schedule II of the Court-Fees Act. This petition is allowed. No costs.

B.V.V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Venugopal and Brother by its proprietor N. Venugopal Naicker and others .. *Appellants**

v.

P. Gopala Chettiar .. *Respondent.*

Limitation Act (IX of 1908), Articles 29, 48 and 49—Attachment before judgment of sewing machine—Disappearance of vital parts of the machine while in the custody of sureties—Raising of attachment—Suit for return of the machine in the condition in which it was at the time of attachment or for damages—Period of limitation.

The sewing machine of a tailor, which is a tool of an artisan, was attached before judgment by the defendants, and was handed over to two sureties. While in their possession some vital parts of the machine were removed from it On the raising of the attachment the owner of the machine refused to take delivery of the machine in the condition in which he found it and sued for the return of the machine in the condition in which it was at the time of attachment or for damages. On a question as to the period of limitation,

Held, that it must be computed under Article 48 or 49 of the Limitation Act and not under Article 29

Krishna Aiyar v *Sudalaimuthu Pillai*, (1945) 1 M L J 265 I L.R (1945) Mad 784 and *Lewis Pugh* v *Ashutosh Sen*, (1928) 56 M L J 517 L R 56 I A. 93 · I.L R 8 Pat. 516 (P C.), followed.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore, in A S No. 312 of 1944 preferred against the decree of the Court of the District Munsiff of Coimbatore in O S. No 752 of 1943.

V. S. Rangaswami Aiyangar for Appellants.

S. S. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The three defendants are the appellants. The facts are fairly simple. The first defendant is the son of the second defendant and the third defendant is their employee in their cloth shop. The plaintiff, who is a tailor, was plying his profession in a portion attached to that shop and he defaulted in the payment of rent. The first defendant filed a suit for the recovery of the rent and before judgment attached the sewing machine belonging to the plaintiff. The sewing machine, after attachment, was handed over to two sureties, who are the second and third defendants. It has been rightly found by the lower appellate Court that during the period when the machine was in the custody of the defendants the vital parts of the machine, namely, the bobbin, shuttle and needle, were removed, and the machine being the sole means by which the plaintiff was earning his liveli-

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1. (1929) 56 M.L J. 394.

* S. A. No. 883 of 1945 27th November, 1945.

hood and it also being the tool of an artisan necessary to enable him to earn his livelihood as such, the attachment was raised on an application made by the plaintiff upon those averments He applied for re-delivery and an amin was sent for the purpose and it was found that the machine had been rendered absolutely worthless by the removal of the important parts and it had also become rusty and unworkable. The plaintiff refused to take delivery of the same and filed the suit out of which this appeal arises for return of the machine in the condition in which it was at the time of the attachment or for damages. The first Court, whose appreciation of evidence and whose grasp of the principles applicable to the question, I must say, is far from satisfactory, made a decree to the effect that the first defendant was not liable at all and that, so far as the second defendant is concerned, he should return the machine in the same condition in which it was brought to Court and, if the plaintiff was not willing to take the same in that condition, the second defendant should pay a sum of Rs 75 as stipulated by the security bond. The plaintiff appealed and the learned Subordinate Judge reversed the findings of the District Munsiff and held that the first defendant also was liable to return the machine in the original condition or pay its value to the plaintiff, and, since the defendants by their conduct had made it impossible for them to return the machine in the original condition in which they took it, the decree of the lower Court was set aside and the three defendants were directed to pay the plaintiff Rs. 200 towards the value of the machine with subsequent interest The present appeal is against that order of the Subordinate Judge.

At the outset the learned Advocate for the appellant has forcibly argued the question of limitation. He contends that, on the facts of the case, article 29 of the Limitation Act becomes applicable and the suit is barred The attachment and delivery of the machine to the sureties in this case was on the 16th July, 1942. The suit was filed on the 2nd August, 1943. The period of limitation provided by article 29 is one year and time from which period begins to run is from the date of seizure. Hence, it is argued, this being a case falling within that article, is barred because the suit was filed after the expiry of one year from the date of seizure Article 29 deals with a suit for compensation for wrongful seizure of moveable property under legal process In support of his contention that the present suit falls within the ambit of that article, the learned advocate for the appellant relies on *Pannaji Devi Chand* v *Firm of Senaji Kapur Chand*[1] The headnote correctly brings out the point decided in that case and is to the following effect :

"Article 29 of the Limitation Act applies to all cases of attachment before judgment where specific moveable property is actually seized and the seizure is wrongful either because the Court had no jurisdiction or because the attachment was obtained on insufficient grounds, the article applies whether the property attached belongs to a defendant in the suit or to a third party The starting point of limitation is the date of actual seizure and the time taken in getting the seizure declared illegal either on appeal or by other means cannot be deducted"

The learned Advocate for the respondents does not dispute the correctness of the principle decided in that case. The principle governs cases where there was an attachment, which was found to have been wrongful, because the Court had no jurisdiction or because the attachment was obtained on insufficient grounds—cases which, in terms, fall within the description of the suits mentioned in Article 29. For a suit under that article, there are no additional factors such as misappropriation or theft or conversion of the attached property. If such complications do not exist, as they did not exist in *Pannaji Devi Chand* v *Firm of Senaji Kapur Chand*[1], then article 29 will apply; but if they do exist we will have to look for some other article in which those additional factors are present and are provided for and that article is article 48. article 48 refers to suits for specific moveable property lost or acquired by theft, or dishonest misappropriation, or conversion, or for compensation for wrongfully taking or detaining the same Where therefore the suit is for compensation for wrongfully taking or detaining the property lost or acquired by theft or by dishonest

1 (1930) 59 M.L.J. 859 I.L.R. 53 Mad. 621.

misappropriation or conversion, article 48 would be applicable, and not article 29. Even if article 48 does not in terms apply, article 49, which is a residuary article, would be applicable, since that article deals with suits for specific moveable property not otherwise provided for, or for compensation for wrongfully taking or injuring or for wrongfully detaining the same The period of limitation under both article 48 and article 49 is three years and the time is to run from the time when the person having a right to the property first learnt in whose possession it was or when the detainer's possession became unlawful. This view finds substantial support in a number of decisions In *Krishna Ayyar* v. *Sudalaimuthu Pillai*,[1] the first defendant, who was the plaintiff in another suit had applied for the attachment before judgment of two brick kilns and had taken custody of the same executing a security bond. The plaintiff in that suit objected to the attachment under Order 21, Rule 58, and on his paying the amount due to the first defendant he was asked to deliver the kilns to the plaintiff When the delivery was effected the plaintiff found that most of the bricks in the kilns had been removed and he filed a suit for the recovery of the value of the bricks It was held that the suit was neither on the security bond, nor for compensation for wrongful seizure of moveable property under legal process (article 29) but one for compensation for wrongfully taking or injuring or wrongfully detaining the property and the appropriate article of the Limitation Act applicable was article 49 which provided three years' limitation from the date of wrongful taking and consequently the suit was not barred by limitation. To facts, which are somewhat similar to those in the present case, the Privy Council applied article 48 in *Lewis Pugh* v *Ashutosh Sen*[2], where their Lordships point out that the two articles (articles 48 and 49) are the only ones that apply to claims in respect of specific moveable properties and that article 48 alone refers to conversion. In an earlier case decided by this Court, *Murugesa Mudali* v *Jotharam Davay*[3], in similar circumstances, it was held that article 49 applied. In execution of a decree obtained by the defendants in that case in the Court of Small Causes certain goods belonging to the plaintiff were attached and the plaintiff preferred a claim which having been disallowed, he filed in the City Civil Court, Madras, a suit and obtained a declaration of his title to the goods; but, prior to the date of the decree, the goods attached had been sold by the Court of Small Causes and certain third parties had become purchasers The plaintiff sued for the recovery of the goods or their value as compensation. Since in that case the goods were not in possession or under the control of the defendants it was found that he was not entitled to the recovery of the goods *in specie* and that his only remedy was by way of damages for the wrongful taking of his goods at the instance of the defendants. With regard to the question as to which article of the Limitation Act applied, it was held that the suit, being framed for the recovery of specific moveable property, was governed by article 49 and the alternative prayer for the value of the goods as compensation must be read as ancillary to the main relief asked for with reference to section 208 of the Code of Civil Procedure and did not alter the character of the suit or bring it within any other category of the schedule to the Limitation Act.

In the present case the findings are, and I agree with them entirely, that the most vital parts of the machine were actually stolen while the machine was in the possession of the defendants. A distinction is sought to be made with regard to the first defendant who was not one of the sureties and who as such was not in possession of the machine; but the lower appellate Court has rightly held that in the circumstances of the case he must also be made liable. It is not necessary to go into the grounds upon which that view is founded as I am clear that the learned Subordinate Judge was right in that view expressed by him in these terms:

"The first defendant cannot now escape by stating that the machine was entrusted only to defendants 2 and 3 and that he had no hand in either the retention of the machine or the removal of its important parts He and the second defendant along with their employee, the third defendant, should have connived and removed the missing parts so as to deprive the plaintiff of the machine.

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1. (1945) 1 M L J 265 · I L R. 1945 Mad 784.
2. (1928) 56 M.L J 517 : L R. 56 I.A. 93 : I L R 8 Pat. 516 (P C.).
3. (1899) I.L R. 22 Mad 478

They are bound to return the machine to the plaintiff in the condition in which it was entrusted to hem and the evidence of the second defendant shows that they will not be able to do it because he denies that he removed any parts from that machine I totally disbelieve his evidence "

On a careful scrutiny of the evidence he found that defendants 2 and 3 did not offer to deliver the machine to the plaintiff in the condition in which it was handed over to them and that they removed some important parts from the machine; and that the defendants have by their conduct made it impossible for them to return the machine in the original condition in which they took it, and consequently a direction for the return of the machine in that condition at that stage was practically useless and would be infructuous. He therefore set aside the decree. With these conclusions as I have already indicated, I agree. I am of the opinion that article 48 or article 49 would apply, and not article 29.

On the facts, I agree with the findings of the learned Subordinate Judge and find all the defendants liable to pay to the plaintiff a sum of Rs. 200 towards the value of the machine with subsequent interest as decreed by the learned Subordinate Judge.

I may say before closing that the question of limitation was not specifically raised at any earlier stage by the appellant; but, since there is no question of any additional facts having to be brought on record and as it was purely a question of law, I allowed the point to be raised and argued before me.

In the result the appeal is dismissed with costs.

Leave to appeal is refused.

V.P S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE WADSWORTH AND MR. JUSTICE RAJAMANNAR.

F. P S. Albuquerque .. *Appellant**

v.

The Catholic Bank, Ltd , by its Secretary, Mr. C. V N Pais . *Respondent.*

Arbitration Act (IX of 1899), *section* 15—*Construction—' On being filed', 'as if it were a decree'—Award registered, filed and decree passed—Time for execution—Starting point—Limitation Act (IX of* 1908), *section* 14 *and Article* 182

The words ' on being filed ' occurring in section 15 of the Arbitration Act (IX of 1899) indicate the point of time from which the award is deemed to be enforceable, as if it were a decree The award only acquires the incidents of a decree when it is filed in Court, and in applying article 182 of the Limitation Act the date of the decree or order cannot be any earlier than the date on which by being filed into Court that which was a non-judicial decision becomes clothed with a judicial character as if it were a decree This construction may lead to the anomalous result that there can be no limitation whatever for the filing of an award in Court But Courts are not concerned with the consequences of a statutory provision when the language of it is plain and its meaning clear It is the business of the Legislature and not of Judges to amend defective statutes.

An award given in 1938 was registered and filed in the Subordinate Judge's Court A decree was passed. In an appeal against an order in execution of this decree it was held that the award came under the provisions of the Arbitration Act of 1899 and not under the Code of Civil Procedure As a result, the award was filed in the District Court on the 15th March, 1944. On execution being taken it was objected that execution was barred by limitation, because the petition was filed more than three years after the date of the original award

Held, that the execution application was within time and that further, even if the above view was not correct, section 14 of the Limitation Act could be relied upon in the circumstances of the case to save the bar of limitation

Appeal against the order of the District Court of South Kanara dated 23rd June, 1945, in R E. P. No 5 of 1944 in O P. No. 36 of 1944

The Advocate-General (*K Rajah Aiyar*) and *Messrs Pais, Lobo* and *Alvares* for Appellant.

B. Sitarama Rao and *R. Somanatha Rao* for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellant was indebted to the respondent bank and the parties referred their dispute regarding the debt to an arbitrator who, on 3rd January, 1938, gave an award in favour of the bank holding that the appellant had to pay

* A. A. O. No 436 of 1945. 1st February, 1946.

Rs. 54,492-4-0. This award was registered on the 20th January, 1938, and on the 31st January, 1938, it was filed in the Court of the Subordinate Judge, South Kanara, on the assumption that the procedure laid down in Schedule II to the Code of Civil Procedure would apply. A decree was passed and against an order for execution of this decree there was an appeal which was eventually decided by a Full Bench of this Court on the 25th January, 1944.[1] The Full Bench held that because the creditor was a limited company registered under the Indian Companies Act, the award must necessarily come under the provisions of the Indian Arbitration Act of 1899 and not under the Code of Civil Procedure. As a consequence of this decision the arbitrator at the instance of the respondent filed the award in the District Court on the 15th March, 1944. Notice was given and it was recorded that neither party objected to the award and the award was filed Thereafter the creditor proceeded to take out execution and in the execution, objection was taken that execution was barred by limitation, because the petition was filed more than three years after the date of the original award. The executing Court overruled this objection relying on the decision in *Udaychand Pannalal* v *Bhagirathlal Ghasiprasad*[2], and directed execution to proceed. Hence the appeal.

It seems to us that the objection on the ground of limitation cannot be sustained, having regard to the terms of section 15 of the Arbitration Act (IX of 1899) which runs as follows:

"An award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the reconsideration of the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the Court . "

It seems to us that the words " on being filed " indicate the point of time from which the award is deemed to be enforceable as if it were a decree. The verb in the clause " as if it were a decree " is clearly in the present tense of the subjunctive mood If the Legislature had intended that the award should be deemed to have been a decree with effect from the date on which it was originally passed by the arbitrator, instead of the word " were " we should expect to find the words " had been".

It is pointed out that the result of this construction is that there can be no limitation whatever for the filing of an award in Court and that it might be possible to file in Court an award which was twenty years old without leaving open any objection to the parties on the ground of limitation, provided that execution is taken within three years of the date of filing That may be an anomalous result. But we are not concerned with the consequences of a statutory provision when the language of it is plain and its meaning clear. It is the business of the Legislature and not of the Judges to amend defective statutes. To our minds it is quite clear that the award only acquires the incidents of a decree when it is filed in Court, and in applying Article 182 of the First Schedule to Limitation Act the date of the decree or order cannot be any earlier than the date on which by being filed into Court that which was a non-judicial decision becomes clothed with a judicial character as if it were a decree. We may also observe that in our opinion even if this view were not correct, the respondent would be entitled to rely on section 14 of the Limitation Act in the circumstances of the present case.

In the result, therefore, the appeal is dismissed with costs.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA AND MR. JUSTICE CHANDRASEKHARA AIYAR.

Pethu Reddiar and others .. *Petitioners**

v.

Rajamba Ammal *Respondent*

Civil Procedure Code (V of 1908), section 110—Alienations in favour of different persons—Suit by wife of alienor to have it declared that they were invalid as her husband was insane and a near relative engineered the sales in favour of himself and his confederates—Common cause of action—Single suit against different alienees—Dismissal

1. (1944) 1 M L J. 290 (F B)
2. (1935) I L R 62 Cal. 833.

*C.M.P. No. 5281 of 1944. 15th December, 1944.

—*High Court reversing and passing decree in favour of plaintiff—Certificate for leave to appeal to Privy Council —Value of all the properties—If can be taken as a whole*

Three alienations were effected by *S* in favour of *X*, *Y* and *Z* for a stated consideration of Rs 7,250 and another alienation was effected in favour of A The wife of *S* filed two suits one against *X*, *Y* and *Z* and the other against *A* to have it declared that the various alienations were invalid as *S* was of unsound mind and *X* (a near relative of her husband *S*) brought about all the sale deeds and took the sales in his own favour and others taking advantage of the youth and helplessness of *S* and thus helped himself and his confederates in getting a slice of *S*'s properties The suits were dismissed by the trial Court but decreed on appeal *X*, *Y* and *Z* applied for a certificate for appealing to His Majesty in Council It was contended that the suit against *X*, *Y* and *Z* must be treated as three different suits and that each alienee must show that the value of the properties of which he was in possession is Rs 10,000 or upwards It was conceded that the market value of all the properties at the date of the appellate decree was over Rs 10,000

Held This was a case where there was a common cause of action against all the alienees and as the valuation of the suit taken as a whole was above Rs 10,000 and the decision of the High Court was one of reversal, the certificate for leave to appeal to His Majesty in Council ought to be granted

Vaithilinga Mudaliar v *Somasundaram Chettiar*, (1918) I L R 42 Mad 228 36 M L J 119 distinguished

Petition under sections 109, 110 and Order XLV, rules 1 and 2 Civil Procedure Code and clause 39 of the Letters Patent praying that in the circumstances stated therein the High Court will be pleased to grant a certificate to enable the petitioners to appeal to His Majesty in Council against the judgment and decree of the High Court dated 28th April, 1944, in A S No 381 of 1941, preferred against the decree of the Court of the Subordinate Judge, Trichinopoly (Additional Judge) dated 25th December, 1941 in O S No 28 of 1933

K Rajah Aiyar for *M S Vaidyanatha Aiyar* for Petitioners.

K G Srinivasa Aiyar for Respondents

The Court made the following

ORDER.—Two suits were filed in the Subordinate Judge's Court of Trichinopoly by the same plaintiff to have it declared that various alienations effected by her husband, one Somasundara, were invalid for the reasons set out in the plaints The suits were dismissed by the trial Court but on appeal this Court reversed the decision of the lower Court and granted a decree in both the suits The petitioners, who were defendants 1, 3 and 6 in the lower Court and respondents 1, 3 and 7 in the appeal, seek to take the matter to His Majesty in Council in appeal There was only one defendant in the other suit, O S No 27 of 1933, and he also desires to appeal to His Majesty in Council Taking the first suit which is treated as the main suit (O S No 28 of 1933), three alienations were effected in favour of the petitioners for a stated consideration of Rs 7,250 It is not disputed by Mr. Srinivasa Aiyar, the learned advocate for the respondent before us, that the market value of the properties included in the three sales on the date when the High Court delivered its judgment would be more than Rs. 10,000 and having regard to the rise in prices since 1931 we think that this is a very proper concession to make. It is therefore unnecessary to consider whether the value of the mesne profits decreed against these three petitioners should also be included in the valuation for the reason that the mesne profits have not yet been ascertained If it were necessary, we should be inclined to say that the mere fact that the mesne profits have not yet been ascertained is no ground for not including the value of the mesne profits for the purpose of ascertaining the value of the subject matter of the appeal to His Majesty in Council by the petitioners. But in view of the concession made it is unnecessary to go into this question.

The main objection put forward on behalf of the respondent is that the suit against the three petitioners is really made up of three suits allowed to be included in one suit by the practice followed in this and other High Courts and reliance is placed on the decision of this Court in *Vaithilinga Mudaliar* v. *Somasundaram Chettiar*[1], to show that for the purpose of the appeal to His Majesty in Council the suit against the three sets of alienees must be treated as three different suits and that each alienee must show that the value of the properties of which he is in

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1. (1918) 36 M.L.J. 119 : I.L.R 42 Mad. 228.

possession is Rs 10,000 or upwards In the present case, however, it was alleged in the plaint that Somasundara, the alienor, was of unsound mind and in any event not capable of understanding the contracts which he was entering into and of forming a rational judgment as to their effect upon his interests. The plaint which was started as an application for leave to file a suit in *forma pauperis* says this in paragraph 15 .

> " The respondents are connected together as relatives, friends and members of one faction, bound together by the common purpose of making illegal gain at the expense of the helpless insane petitioner who was entirely in their custody and control The said transactions are also connected by the same persons being the executees, attestors, writers or identifying witnesses before the Registrars etc "

and in paragraph 18

> " In case the Court holds that the mental condition of the petitioner has not been such as to legally unfit him for effecting the said transactions, it is submitted that the said transactions, disadvantageous to the petitioner as they are, were and could only have been effected and brought about by the exercise of undue influence by the respondents in the case who were in position to dominate the will of the petitioner, helpless, weak and defenceless as he was in his mental infirmities and troubles "

This Court found that the alienations in question were all engineered by the first, sixth and twelfth defendants, very near relations of Somasundara, in conjunction with the other defendants who were their partisans It was pointed out that it appeared clear that the first defendant brought about all the sale deeds and took the sale in his own favour taking advantage of the youth and helplessness of Somasundara and thus helped himself and his confederates in each getting a slice of Somasundara's properties. The Court then went on to point out

> " The sixth defendant who is Somasundara's mother's sister's husband and who stood in equal degree of relationship to Somasundara is another unsrcupulous man who took another property for Rs 4,000 Rajambu's sister's husband, the 12th defendant, is yet another and the other defendants seem to be partisans of the first and second defendants "

This is a case where there is a common cause of action against all and we therefore hold that the principle of the decision in *Vaithilinga Mudaliar* v *Somasundaram Chettiar*[1], and the other decisions which follow it is not applicable to this case It is not disputed that the valuation of the suit taken as a whole on the date of the plaint was above Rs 10,000 In the plaint the value is said to be over Rs 32,000

We issue a certificate that the value of the subject-matter of the suit in the Court of First Instance is above Rs 10,000 and that the value of the subject-matter in dispute on appeal to His Majesty in Council is also above Rs 10,000. The decision of this Court being one of reversal of the decision of the lower Court, the case satisfies the requirements of law and we direct the grant of the usual certificate

K S ——— *Certificate granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE WADSWORTH AND MR JUSTICE RAJAMANNAR.

Hanumantha Gowd . *Appellant**

v

The Official Receiver, Bellary *Respondent.*

Provincial Insolvency Act (V of 1920), section 28 (4)—Insolvency of one of the coparceners in a joint Hindu family—Death of another co-parcener—Share of insolvent, vested in Official Receiver whether increased by survivorship —Words ' acquired by ' and ' devolves on ' in section—Meaning of

When a member of a joint Hindu family is adjudged insolvent, his status in the joint family of which he is a member remains unchanged If by a death in the coparcenary the share of the insolvent coparcener is increased, the benefit of the increase will accrue to the Official Receiver in whom that share is vested The reason why the Official Receiver is entitled to any subsequent increase of the insolvent's share is not because the Official Receiver is a coparcener in Hindu Law, but because by section 28 (4) of the Provincial Insolvency Act he is entitled to all property which is acquired by or devolves on the insolvent It is the insolvent who by Hindu Law becomes entitled to the increase of his share and it is the statutory provision of the Act, section 28 (4), which vests that increase in the Official Receiver

At the time of the adjudication, the family of the insolvent consisted of himself, his brother and a deceased brother's son (the present petitioner) The brother died On a contention by the

1. (1918) 36 M L.J 119 : I.L.R. 42 Mad 228

* A. A. O No 144 of 1945 30th January, 1946.

brother's son that the share of the insolvent vested in the Official Receiver would not be increased at all by survivorship as a consequence of his brother's death,

Held, that the words "acquired by" and "devolves on" in section 28 (4) of the Provincial Insolvency Act could not be given a narrow meaning They are both very wide words obviously intended to cover all the ordinary ways in which the estate of the insolvent may be increased from time to time during his insolvency As, therefore, the insolvent continued to be a coparcener and as by the death of his brother the addition to his share may be said to be acquired by him or to have devolved on him, it followed that this accretion vested in the Official Receiver

In the matter of *The Hindu Women's Rights to Property Act*, 1937, (1941) 2 M L J. 12 at page 29 4 F L J. 1 (F C) referred to

Appeal against the order of the Court of the District Judge of Bellary dated 21st December, 1944, in I A. No. 204 of 1944, in I. P. No 26 of 1936.

B. V. Ramanarasu for Appellant.

K. Umamaheswaram for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J—The appellant filed a petition under section 4 of the Provincial Insolvency Act praying for a declaration that the Official Receiver in the insolvency of Hanumantha Gowd was not entitled to the share which would in the absence of any impediment have passed to the insolvent on the death of his brother Bhimana Gowd on the 21st March, 1944. The petitioner is a nephew of the insolvent who was adjudged in 1937 At the time of the adjudication the family consisted of the insolvent, his brother Bhimana Gowd and the petitioner who is the son of a deceased brother. When Bhimana Gowd died in 1944, the result, according to the present petitioner, would be that the share of the insolvent vested in the Official Receiver would not be increased at all by survivorship as a consequence of his brother's death and that the whole of the share of the deceased coparcener would pass by survivorship to the non-insolvent coparcener, the petitioner. This contention has been negatived by the trial Court.

Section 28 (4) of the Provincial Insolvency Act prescribes that all property which is "acquired by or devolves on" the insolvent after the date of the order of adjudication and before his discharge shall forthwith vest in the Court or the Receiver. It cannot now be contended that the insolvency of a coparcener effects a separation of that coparcener from the joint family of which he is a member. He continues to be a coparcener and the decision of Venkataramana Rao, J., in *Lakshmanan Chettiar* v *Srinivasa Iyengar*[1], which was pressed in the lower Court must be deemed no longer good law in the light of the Bench decision in *Noony Suryanarayanamurthi* v. *Noony Veeraraju*[2] to which one of us was a party. In the latter case it was held that, when the adjudication of a coparcener of a joint Hindu family was annulled, his share of the family property which was vested in the Official Receiver would revert to the former insolvent as family property and not as self-acquired property That decision postulates the position that, when a man is adjudged an insolvent, his status in the joint family and his rights in the property of the joint family remain unchanged It would therefore seem to follow that if by a death in the coparcenary the share of the insolvent coparcener is increased the benefit of the increase will accrue to the Official Receiver in whom that share is vested.

It has been contended that because any decrease in the insolvent's share by the birth of a further member in the family would not take away from the Official Receiver any part of the share of the insolvent as it stood on the date of the adjudication, it must logically follow that any increase of the share of the insolvent would not pass to the Official Receiver. But it seems there is no such logical consequence. The reason why the Official Receiver does not lose that which was vested in him is because the vesting amounts to an alienation which crystallizes the share of the insolvent to which the alienee is entitled as on the date of the adjudication. The reason why the Official Receiver is entitled to any subsequent increase of the insolvent's share is not because the Official Receiver is a coparcener in Hindu Law, but because by section 28 (4) of the Provincial Insolvency Act he is entitled to all

1. (1936) 71 M L J 707 : I.L.R. 1937 Mad. 203.
2. (1945) 1 M.L J 292 · I.L R. 1946 Mad. 54.

property which is acquired by or devolves on the insolvent ; that is to say, it is the insolvent who by Hindu Law becomes entitled to the increase of his share and it is the statutory provision of the Provincial Insolvency Act, section 28 (4) which vests that increase in the Official Receiver

It has been argued by Mr. Ramanarasu for the appellant that the words "is acquired by or devolves on" are not wide enough to cover the passage of property by survivorship. His argument is that the words "acquired by" necessarily connote getting by some effort and the words "devolves on" necessarily connote the passage of property downwards, as by inheritance. It seems to us that this narrowing of the meaning of these words so as to confine them to what was possibly their original connotation is not in accordance with English usage and it is not in accordance with the view taken by the Federal Court in In the matter of *the Hindu Women's Rights to Property Act*, 1937[1]. Both the words in section 28 (4) are very wide words, obviously intended to cover all the ordinary ways in which the estate of the insolvent may be increased from time to time during his insolvency. As, therefore, he continues to be a coparcener and as by the death of his brother the addition to his share may be said to be acquired by him or to devolve upon him, it follows that this accretion vests in the Official Receiver. In this view we dismiss the appeal with costs.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE WADSWORTH AND MR. JUSTICE RAJAMANNAR.

Bodapati Rajeswararao .. *Appellant**

v.

Puligedda Satyanarayana and others . *Respondents*

Civil Procedure Code (V of 1908), Order 32, rule 7 (1-A) (Madras)—Compromise of connected suits—Compromise incapable of being split up—Failure of compromise with regard to one suit—Omission by advocate of minor party in the other suit to give certificate—Entire compromise if vitiated

In two connected suits a compromise was filed in Court and the advocate appearing for a minor in one of them omitted to record his certificate that the compromise was beneficial to the minor The compromise was not capable of being split into two parts and it was not ascertained to what extent the provisions relating to the settlement of one suit were recorded as consideration for the provisions relating to the settlement of the other suit There was also a joint provision regarding costs and there was nothing to indicate how the costs were to be apportioned between the two suits. The compromise in the suit in which the minor was not a party having failed, in a suit to set aside the compromise in the other suit in which the minor was a party and the decree which flowed therefrom,

Held, (1) it is difficult to hold that the guardian of a minor must obtain the consent of the Court before the agreement to compromise is reached. He must no doubt obtain the consent of the Court before the compromise is concluded, but the conclusion of the compromise comes about when the compromise is made a decree of Court.

Awadhesh Prasad Missir v *Widow of Tribeni Prasad Missir*, (1939) I L R 19 Pat 343, not followed.

(2) Though it is doubtful whether it is necessary that the certificate of the advocate appearing for the minor should be in any particular form, the Court may be inclined to hold that he has sufficiently complied with the provisions of clause (1-A) of rule 7 of Order 32, Civil Procedure Code (as amended in Madras) if in substance he does certify to the Court that in his opinion the compromise is beneficial to the minor But, in the circumstances of the case, the absence of the certificate of the advocate was more than a mere matter of form in that it affected the substance of the compromise and the failure of the compromise in one part vitiated the compromise in its entirety

Appeal against the order of the Court of the Subordinate Judge, Vizagapatam, dated 22nd December, 1943, in I. A No. 727 of 1943, in O. S No. 63 of 1941.

N. Narasimham and *N. Ramakrishnayya* for Appellant

Y. Suryanarayana and *D Narasaraju* for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—This appeal arises out of an order recording a compromise in a suit for a declaration that the present appellant—second defendant in that suit—was not validly adopted by the widow of the maternal uncle of the plaintiffs. The family with which we are concerned comprised originally one Lakshminara-

1. (1941) 2 M L J. 12, 29 . 4 F L J. 1 (F.C.).

* A. A. O. No. 448 of 1944. 29th January, 1946.

simham, who died in May 1934, leaving certain properties, his sister, the present first defendant and another sister Sundaramma who died in 1938, the mother of the plaintiffs His widow Seethayamma had a number of sisters, one of whom was married to the present third defendant, her son being the minor appellant She also had a brother, the fourth defendant, who is said to have been acting as the guardian of the appellant. Seethayamma died in July 1941 and she is alleged to have adopted the appellant shortly before her death and to have made a will entrusting to her brother, the fourth defendant, the guardianship of the minor. There were two suits pending at the time of the compromise One with which we are immediately concerned is O S No 63 of 1941. The connected suit was filed by the same plaintiffs against the sisters of Seethayamma. Without going into the details of that suit, which is O S No 54 of 1943, we may say that it concerned the title of the estate of Lakshminarasimham to certain properties originally mortgaged in his favour and sold in discharge of the mortgage to the sisters of Lakshminarasimham's wife The contention of the plaintiffs was that the sisters-in-law were benamidars for Lakshminarasimham and that he was entitled to the properties and that they as his heirs could claim it

The compromise was put into Court by the plaintiffs with an ordinary petition to record it There was no formal application for leave to enter into the compromise filed on behalf of the *guardian ad litem*, the fourth defendant. Nor was there any formal certificate by the advocate appearing for the minor that the compromise was beneficial to the minor; but the advocate himself signed the agreement of compromise and this is, in the opinion of the learned trial Judge, a sufficient indication of his opinion that it was beneficial to the minor, though we must point out that the learned Judge was wrong in saying that in the body of the compromise it is stated that the compromise is beneficial to the minor second defendant There is no reference in the compromise petition to the minority of the second defendant except in the heading thereof

While this petition to pass a decree in terms of the compromise was pending an application was preferred by the natural mother of the second defendant praying for the removal of the fourth defendant from the guardianship and her appointment in his stead This petition was plainly filed in order to put a stop to the compromise proceedings, but it was rejected The terms of the compromise are that the first defendant should at once get possession of items 1 and 2 of schedule A and should receive profits in respect of those two items, that she should also get possession of certain salt pans and the first defendant with the consent of the plaintiffs should abandon the contention that items 1 and 2 of B schedule are the *stridhanam* properties of Seethayamma. By way of *quid pro quo* the minor second defendant is given item 2 of schedule B and the plaintiffs and the first defendant give up all claim to the moveable properties specified in the plaint schedule Then the compromise turns to the matters in the connected suit, O S. No. 54 and it is provided that the sisters of Seethayamma, who are the defendants in that suit, shall undertake to discharge a certain promissory note debt and that in return the plaintiffs shall withdraw their suit for the properties standing in the names of the defendants in that suit. Then follows a provision which seems to us to be of great importance in considering this matter, though it has been apparently overlooked by the trial Court. This is a provision that towards the cost of the first plaintiff both in O. S. No. 63 and in O. S No 54, the defendants 2, 3 and 4 in O S. No 63 shall pay a sum of Rs 400 and the first defendant shall pay Rs. 1,000. By the time when the compromise was recorded in the adoption suit, O. S. No. 63 it was already clear that the connected compromise of O S No. 54 had broken down and the order recording the compromise of O. S. No 63 directs that the trial of O. S No 54, which is covered by the same petition, should proceed.

Now the contentions mostly emphasised in the appellate arguments relate to the procedural defects in the recording of the compromise in O S No. 63. The decision in *Awadhesh Prasad Missir* v *Widow of Tribeni Prasad Missir*[1], has been quoted as authority for the proposition that not only must the guardian of the

1. (1939) I.L.R. 19 Pat. 343.

minor obtain the leave of the Court to enter into a compromise, but he must obtain that leave before the agreement to compromise is concluded. This decision proceeds on the wording of Order XXXII, rule 7 (1) which says :

"No next friend or guardian for the suit shall, without the leave of the Court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian"

With the greatest respect to the learned Judges, who decided the case cited, we find it difficult to hold that the guardian must obtain the consent of the Court before the agreement is reached. No doubt he must obtain the consent of the Court before the compromise is concluded, but the conclusion of the compromise comes about when that compromise is made a decree of the Court. It would no doubt be improper after the compromise had been made effective by the Court for the guardian to obtain an *ex post facto* sanction of the Court for the compromise. But it does not seem to us that the Code contemplates the obtaining of the sanction of the Court to what are mere proposals of a compromise, and there must necessarily be some agreement between the parties before the Court is approached for its approval.

A more serious defect in the procedure is the omission of the advocate appearing for the minor to record in proper form his certificate contemplated in clause (1-A) of rule 7, Order XXXII as amended in Madras. But we doubt whether it is necessary that the certificate of the advocate should be in any particular form and if in substance the advocate does certify to the Court that in his opinion the compromise is beneficial to the minor, we should be inclined to hold that he has sufficiently complied with the provisions of that clause. There is, however, a certain difficulty on the facts of the case in holding that the pleader appearing for the minor has signified to the Court his opinion that the compromise as reported in the present suit O S. No 63 is beneficial to the minor This difficulty is mixed up with what seems to us the more serious defect in the procedure before the lower Court. The lower Court has treated this compromise, which is the subject of a joint petition and of a joint agreement, as if it was in fact two separate compromises of the two suits dealt with therein Not only is it a single compromise covered by a single petition relating to the two suits but the compromise is not capable of being split into two parts, one relating to each of the two connected suits. Nor has any attempt been made to study the compromise for purpose of such division No doubt the main provisions relating to O S No. 63 and the main provisions relating to O. S. No. 54 are quite distinct and separable but we do not know to what extent the provisions relating to the settlement of one suit were recorded as consideration for the provisions relating to the settlement of the other suit. One thing is quite clear and that is that there is a joint provision regarding the costs of these suits, and there is nothing to indicate how those costs are to be apportioned between the two suits Moreover, the minor second defendant is under the compromise made jointly liable along with others for Rs 400 out of the total of Rs. 1,400, which is fixed as the costs, not of O S. No 63 alone, but of both O. S No. 63 and O S No 54 The decree as drawn by the trial Court on the compromise of O. S No 63 seems to imply that all these costs agreed to be paid are to be paid as costs in O S No 63. It is of course quite out of the question to impose any liability on the minor second defendant for the costs of O. S No. 54 in which he was not a party, and the lawyer who signed this joint compromise does not seem to have applied his mind to the question what should be the liability of the minor second defendant if the compromise fails so far as O. S. No. 54 is concerned.

In this view it seems to us that the absence of a proper certificate by the pleader is more than a mere matter of form, that it affects the substance of the compromise, and it does appear to us that the trial Judge in ordering that the compromise be recorded as being beneficial to the minor has entirely overlooked the fact that the failure of the compromise in part must in the circumstances of this case vitiate the compromise in its entirety In this view we allow the appeal with costs and set aside the order recording the compromise and also the decree which flows therefrom and direct the suit to be restored to file and decided on its merits

V.P.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE YAHYA ALI.

Sri Kallalagar Devasthanam, Madura, through its present Executive Officer, Sri R Krishnaswami Pillai .. *Appellant**

v.

Karuppa Pillai and others .. *Respondents.*

Landlord and tenant—Water charges—Basis of right to levy—Tank becoming disused and the remnants of its bed registered as ryoti in the name of owner of the village and assessed to rent—Water from a different source passing through the course on the inside of the old bund of that tank and flowing out through the old sluice and irrigating the lands of the tenants of the owner of the village—Right of the owner of the village to claim water charge for second crop raised by the tenants

At one time a tank in a village belonging to the plaintiff comprised a large extent and had a bund of considerable size with a sluice and other arrangements for irrigation After the erection of the Periyar Dam, supply from that source was provided In consequence a considerable portion of the tank was assigned for wet cultivation leaving a portion of the old bund and sluice without shutters Periyar water passed through the water course on the inside of the old bund and flowed out through the unshuttered hole in the sluice and irrigated the lands in the occupation of the defendants In a claim by the plaintiff for water charge for the second crop raised on the lands in the occupation of the defendants,

Held, the right to levy water charges of this description rests on the principle that the *solum* of the surface from which water is supplied vests in the landholder *qua* landholder. The land having been converted into *ryoti* land and assessed to rent the very foundation on which water charges can be levied disappears

The Madura Kallalagar Devasthanam v *Subbiah Ambalam*, (1940) 1 M L J 160. I.L R 1940 Mad 745, distinguished.

Appeals against the decree of the District Court, Madura, dated 21st April, 1944, in A S No 8 of 1944, preferred against the decree of the Court of the Deputy Collector, Melur Division, in S. S. No. 462 of 1943, etc.

P N. Marthandam Pillai and *C. Rangaswami Aiyangar* for Appellant.

A. V. Narayanaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT —The questions involved in these two appeals are common. The suits out of which these appeals arise were instituted by the proprietor of Amaradakki village in Melur division of Madura district for recovery of rent from his tenants; the defendants, for faslis 1349 to 1351. Two matters were in dispute in the suits. The first was in relation to the water charge claimed by the proprietor for the second crop raised on the lands in the occupation of the defendants which had been registered as single crop wet lands. The second question concerned fishery rents which is not now pressed by the learned advocate for the appellant.

As regards the water charge for the second crop, the Deputy Collector of Melur division found that the plaintiff was not entitled to levy the same, and on appeal the learned District Judge affirmed the Deputy Collector's decree. After having heard both sides I am of the opinion that the view taken in the Courts below is correct. Various questions have been argued, but there is one matter which clinches the issue and which I shall refer to presently. At one time the Amaradakki tank comprised a large extent and had a bund of considerable size with a sluice and other arrangements. After the erection of the Periyar Dam, supply from that source was provided. In consequence a considerable portion of the tank bed was assigned for wet cultivation The only extent remaining was the extent of 3 acres 91 cents comprised in S. No. 30 of 1933 on which it would appear that there are still a large portion of the old bund and the sluice without shutters and a temple without a structure. The Periyar water would appear to pass through the course on the inside of the old bund and flow out through the unshuttered hole in the sluice. The defendants contended that the tank had ceased to be in existence as such and that what remained was nothing but a mere channel course for the Periyar water to flow directly to the defendant's fields. Both the lower Courts upheld that contention. On the plaintiff's side reliance was placed on the decision

* S. A. Nos. 2098 and 2099 of 1944. 14th December, 1945.

in *The Madura Kallalagar Devasthanam* v *Subbiah Ambalam*[1], but the learned District Judge distinguished it on the ground that in that case the Government water had come into the tank belonging to the landholder and had got mingled with the landholder's water, which feature does not obtain in the present case. Apart from those grounds the matters seem to me to be altogether clinched by the fact that in the Re-settlement Register, Ex P-1, the entire extent of S No 30/3, is registered as ryoti land and is assessed to rent and stands as ryoti land in the name of the deity Sundararajaperumal. In that connection the Deputy Collector said in his judgment:

> "Above all, the more important document Ex P-1 (Re-settlement Register) reveals that the tank poramboke S No 30/3 stands in the holding of Sundararajaperumal—the deity under holding No 2 classed as Dry and the extent of 3 91 acres bears an assessment of Rs 4-6-0 with the remark பூஸ்திதி குளம் கண்மாய் புறம்போக்கு சாகுபடி In the face of this record the plaintiff has no case for him There is no tank and no water spread area, with stagnation of water, since the entire extent having been assessed to rent Even assuming that the classification on ground is tank there could only be a narrow strip of land for the Periyar water to flow through the open sluices on the tank bund for the irrigation of the suit lands which have been permitted for irrigation by water permits issued by the Government The entire extent having been treated as ryoti land and assessed with an annual rental value, there is no case of the plaintiff to claim any ownership over the *solum* of the water course "

I entirely agree with this view of the matter The right to levy water charges of this description rests on the principle that the *solum* of the source from which water is supplied vests in the landholder *qua* landholder In this case the land having been converted into ryoti land and assessed to rent, the very foundation upon which water charges can be levied, disappears.

The second appeals are dismissed with costs. Advocate's fee one set. Leave to appeal is refused.

V S. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE BYERS

V. Venkatarama Nayudu .. *Petitioner**

v

The Province of Madras, by representative, the District Collector, Salem .. *Respondent*

Government of India Act (1935), section 240—Police constable guilty of contempt of Court—Accusation against judicial officers—Dismissal without notice—Validity—Meaning of words "criminal charge"

The provisions of section 240 of the Government of India Act regarding notice and an opportunity to show cause are mandatory, but according to the proviso they do not apply to a case "where a person is dismissed on the ground of conduct which has led to his conviction on a criminal charge"

Where a police constable was dismissed from service on the ground that he was guilty of contempt of Court and it appeared that the contempt consisted of highly defamatory accusations against the honesty of presiding officers of Courts in respect of a civil litigation which he was conducting,

Held, that although the contempt in the particular case was not an offence within the narrow limits of the Indian Penal Code, it was nevertheless a matter giving rise to a "criminal charge" within the meaning of the proviso in section 240 (3) (*a*) of the Government of India Act, and that the order of dismissal from service without observing the formalities regarding notice was valid

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Salem, dated 24th November, 1944, in O.P. No 41 of 1944

K. V. Ramachandra Aiyar for Petitioner.

The Government Pleader (*K Kuttikrishna Menon*) for Respondent

The Court delivered the following

JUDGMENT.—The petitioner was formerly a police constable who served from 1909 until 1940 when he was dismissed by the District Superintendent of Police at Salem because of his conviction and sentence by the High Court for contempt of Court.

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1 (1940) 1 M L.J 160 : I.L R. (1940) Mad 745.

* C.R.P. No. 761 of 1945. 21st January, 1946.

The petitioner brought a suit for a declaration that his dismissal was wrongful in that it had been made without any notice to him and without any opportunity of showing cause, and he also asked for arrears of pay amounting in all to Rs 972 The suit was brought *in forma pauperis* and without going into the question of pauperism, which was contested by the learned Government Pleader, the learned District Munsiff dismissed the suit under Order 33, rule 5 (*d*) of the Code of Civil Procedure.

The dismissal of the petitioner by the District Superintendent of Police was under rule 77 of the Police Standing Orders. The rule is in these words:

"(1) No Police Officer, convicted of an offence and sentenced to imprisonment, shall be retained in the service, without the special order of the Inspector-General

(2) A Police Officer sentenced to fine only need not be dismissed The District Superintendent shall decide whether he deserves dismissal or any other punishment, and act accordingly

(3) An order of dismissal shall not be passed, until the conviction has been finally upheld on appeal, or the time allowed for appeal has expired"

Before the learned District Munsiff the only contention raised on this aspect of the matter was that the conviction by the High Court for contempt of Court is not an offence, but the learned District Munsiff relied on the decision in *Rajah* v. *Witherington*[1], in which it was held that although it was not an offence within the ambit of the Penal Code it was nevertheless an offence A further argument was advanced in this Court, namely, that in the case of dismissal or conviction of an offence with a sentence of imprisonment, dismissal could not be made except by the Inspector-General of Police This point was not raised in the lower Court, but apart from this there seems no room for this contention because the rule provides that such a person cannot be retained in service without the special orders of the Inspector-General. Consequently it is only when there is a proposal to retain him in service, for example, when he has been convicted only of some minor offence involving no moral turpitude, that the jurisdiction of the Inspector-General is invoked.

Mr. K V. Ramachandra Aiyar's main argument in this Court is that although contempt of Court may be an offence, it is not a "criminal charge" within the meaning of the proviso in sub-clause (*a*) of clause (3) of section 240 of the Government of India Act This point does not appear to have been raised in the lower Court but it may readily be disposed of That the case is governed by section 240 of the Government of India Act is made clear by the decision of the Federal Court in *Suraj Narain Anand* v *N. W Frontier Province*[2] The provisions in section 240 of the Government of India Act regarding notice and an opportunity of showing cause are mandatory, but according to the proviso they do not apply to a case "where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge" An offence has been defined in section 3 (37) of the General Clauses Act as "any act or omission made punishable by any law for the time being in force" The word "charge" has been defined in section 4 (*c*) of the Code of Criminal Procedure in this way:

"'Charge' includes any head of charge when the charge contains more heads than one"

It must be clear from this definition that the word has been there defined only in its relation to the Code of Criminal Procedure The way in which the word has been used in section 240 of the Government of India Act obviously contemplates some accusation and not merely a charge in the technical sense of the Code of Criminal Procedure. This being so, we are left only with the word "criminal" for discussion; and in discussing the preamble to the Code of Criminal Procedure, Ranganatha Aiyar has dealt with the word in this way in the sixth edition of his commentary:

"The word 'criminal' is used in opposition to civil as also to ecclesiastical, political, or military It comes from the latin *crimin* (judgment, accusation) and means generally and simply 'of or belonging to an accusation' The reason for the trial of a person for a criminal offence is not a contest of private interest in which the rights of parties can be waived at pleasure The prosecution of criminals and administration of criminal law are matters which concern the State Every citizen

1. (1934) 66 M.L.J. 650 : I.L.R. 57 Mad. 831.

2. (1942) 1 M.L.J. 77 : I.L.R. (1942) Lah. 692 : 4 F.L.J. 22 (F.C.)

has an interest in seeing that persons are not convicted of crimes and do not forfeit life or liberty except when tried under the safeguards so carefully provided by law "

At this point it is useful to examine the nature of the contempt of which the petitioner was convicted by this Court on the motion of the Advocate-General. He was the plaintiff in a suit in the District Munsiff's Court at Salem and in the course of an affidavit filed in support of an application asking for certain documents to be called for he alleged that in a previous suit not only the District Munsiff and the Subordinate Judge but also a Judge of this Court had been bribed Not content with this he went on to allege that in the suit in which he was then involved the District Munsiff had received a bribe of Rs 1,000 and the learned Chief Justice then pointed out that " he has added to his offence in this Court by affirming that his allegations were true " The only reason which influenced the learned Judges in giving him simple imprisonment was that there was no other alternative It is difficult to conceive of a more deliberate and a more scandalous contempt. Courts are familiar with other forms of contempt which are dealt with in the Code of Civil Procedure, which contains provisions for dealing with litigants who disobey the orders of Court, who flout injunctions granted against them, and so on; but in this latter class of cases it can readily be seen that there is nothing of a criminal character or anything involving moral turpitude In the case with which we are now concerned the contempt consisted in bringing highly defamatory accusations against the presiding officers in Courts from the lowest to the highest, and having regard to the distinctions elaborated by Ranganatha Aiyar in discussing the meaning of the word " criminal " it cannot be doubted that a contempt of this character is criminal There is no question of any private dispute between the parties to the suit, the contempt being one which attacks the purity of the whole judicial administration. I accordingly hold, agreeing with the learned Government Pleader, that although a contempt of this nature may not be an offence within the narrow limits of the Indian Penal Code, it is nevertheless a matter giving rise to a criminal charge within the meaning of the proviso in section 240 (3) (*a*) of the Government of India Act As the petitioner has been convicted on a criminal charge, it necessarily follows in accordnace with this section that the formalities regarding notice and a reasonable opportunity of showing cause were dispensed with The learned District Munsiff was, therefore, correct in his finding that there was no cause of action disclosed in the plaint As there was no error of jurisdiction the petition is ordered to be dismissed with costs

B V.V. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO

S. Ranganathan and others . *Petitioners**

v.

A. Krishnayya, Arbitrator, Lloyds Road Area Town Planning Scheme and another . *Respondents*

Madras Town Planning Act (VII of 1920, as amended by Madras Act II of 1930), sections 15 (2), 23 and 29 and Arbitration Act (X of 1940), sections 30, 46 and 1st Schedule, clause 3—Scope of the power of the Government to amend a sanctioned scheme—Enlargement of time for submission of claims for betterment contribution—Legality—Application for issue of prerogative writs to quash proceedings before the arbitrator appointed under Chapter V of the Madras Town Planning Act—Existence of another available remedy—Effect—Applicability of the Arbitration Act to proceedings before the arbitrator appointed under the Madras Town Planning Act—Computation of four months time under clause 3 of first schedule of the Arbitration Act—Appeal under section 29 of the Madras Town Planning Act—Powers of Chief Judge of the Court of Small Causes hearing—If controlled by section 30 of the Arbitration Act

The Provincial Government sanctioned a Town Planning Scheme for a particular area in the City of Madras, by a Notification of the 8th November, 1938 The Government varied the scheme by

*C M P. Nos. 5892, etc., of 1945. 21st January, 1946.
C. R. P. No. 1557 of 1945

extending the time within which the Corporation of Madras could submit claims for betterment contribution under section 23 of the Madras Town Planning Act On a claim being made for betterment contribution by the Corporation of Madras before the arbitrator appointed under Chapter V of the Madras Town Planning Act, the validity of the procedure adopted by the Government in the matter of the extension of time was objected to But without waiting for the arbitrator to hear the objections some of the property owners concerned applied to the High Court for the issue of a writ of *certiorari* to quash the proceedings before the arbitrator on the ground that the proceedings which had already taken place were illegal because the Provincial Government had no power to amend the scheme so as to enlarge the time for preferring claims for betterment contribution and further that the proceedings had become void as the award was not delivered within the period fixed by clause 3 of the first schedule of the Arbitration Act

Held, it is not the practice of the High Court to issue a prerogative writ where there is another remedy open to an aggrieved party and it would be wrong to do so In the present case there was another remedy open to the petitioners Section 29 of the Town Planning Act provides a right of appeal from a decision of the arbitrator falling within clause (*c*) or clause (*d*) of sub-section (1) of section 27 to the Chief Judge of the Court of Small Causes.

The Provincial Government when acting under the provisions of the Madras Town Planning Act, is not exercising a power "delegated" to it It is exercising the power conferred upon it directly by statute At any stage it had the power to amend the scheme by enlarging the time for submission of claims for contribution That is the plain meaning of section 15 (2) of the Act

The exception contained in section 46 of the Arbitration Act takes away the Madras Town Planning Act out of its purview Even if rule 3 of the first schedule of the Arbitration Act does apply to arbitration under Chapter V of the Madras Town Planning Act—in their Lordships' opinion it does not—the only rational away of applying it would be to consider the four months period as commencing from the date on which the arbitrator entered upon the hearing of a particular claim.

The powers of the Chief Judge of the Court of Small Causes hearing an appeal under section 29 of the Madras Town Planning Act are not restricted by section 30 of the Arbitration Act Section 29 of the Madras Town Planning Act states exactly what decisions are appealable and section 30 of the Arbitration Act does not restrict an appeal under the former section

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* to call for records from the first respondent, A. Krishnayya, Arbitrator, Lloyds Road Area, and quash the decision of the Commissioner of the Corporation of Madras in furnishing the petitioner's name to the Arbitrator as the person to be proceeded against in respect of claim No 47 and the decision of the Arbitrator in issuing to the petitioner the notice dated 12th November, 1945

C M P. Nos. 5892, etc , of 1945.

V K Tiruvenkatachari, K. Soundararajan, G Vasanta Pai and *D. Suryaprakasa Rao* for Petitioners

Dr V K John and The Government Pleader (*K. Kuttikrishna Menon*) for Respondents

C R P No. 1557 of 1945.

Dr V K. John for Petitioners.

V K Tiruvenakatachari, K Soundararajan and The Government Pleader (*K. Kuttikrishna Menon*) for Respondents

The Judgment of the Court was delivered by

The Chief Justice—All these petitions can be dealt with in a common judgment. Except in C M P No 6057 of 1945 and the connected C R P No 1557 of 1945, the facts are the same.

We will first deal with the petitions in which the facts are identical. Here the petitioners ask for the issue of a writ of *certiorari* to quash proceedings before the arbitrator appointed under Chapter V of the Madras Town Planning Act of 1920 and of a writ of prohibition against further proceedings being entered upon

On the 19th August, 1930, under section 12 of the Madras Town Planning Act of 1920, as amended by Madras Act II of 1930, the Provincial Government directed the Corporation of Madras to prepare, publish and submit for its sanction by the 1st May, 1931, draft schemes in respect of lands specified in three areas in the City of Madras, namely, the Lloyds Road Area, the Cathedral (South) Area, and the Mylapore Eastern Section Area, the boundaries of these areas being defined.

by the notification The petitions before us relate only to the Lloyds Road Area. By notifications issued from time to time the Provincial Government extended the time within which the Corporation of Madras was to comply with the notification of the 19th August, 1930 So far as the Lloyds Road area was concerned, the last extension was to the 16th March, 1936 The Corporation submitted its scheme by that date

On the 8th November, 1938, the Provincial Government issued a notification sanctioning the scheme under the provisions of section 14 of the Act. Section 15 (2) states that the Provincial Government may, at any time, by notification in the official Gazette, vary or revoke a scheme sanctioned under section 14. Before issuing a notification under section 15 it must publish in the prescribed manner a draft of the notification together with a notice specifying a date on or after which the draft will be taken into consideration and must consider any objection or suggestion which may be received in respect of the draft from the council concerned or any person affected by the scheme Having complied with the requirements of the Act the Provincial Government varied the scheme by extending the time within which the Corporation of Madras could submit claims for betterment contribution under section 23 In the scheme as originally sanctioned, the time fixed was two years from the date of the notification, that is, two years from the 8th November, 1938 The amendment extended the period to two years and three months from the 8th November, 1938

On the 21st January, 1941, the Corporation passed a resolution in which it decided to make claims for betterment contribution against the property owners in the area In the meantime the Provincial Government had appointed the Collector of Madras to be the arbitrator under Chapter V of the Act The Corporation submitted its claims to the Collector on the 1st February, 1941 On the 21st July, 1941, the Collector of Madras passed an order notifying that the work had been commenced from the 15th July, 1941 and stating that all correspondence relating to the schemes should be sent to his office This order was published in the local press on the 28th August, 1941 Nothing further happened until the 21st March, 1944 On that date the Provincial Government appointed a new arbitrator to whom the proceedings were transferred as from the 1st April, 1944

The new arbitrator announced that he would commence his duties on the 15th April, 1944, but notices to the owners of property in the area were not issued until 1945 The petitioner in C M P No 5892 of 1945 was not served with notice until the 18th November, 1945 He filed a statement objecting to the validity of the proceedings and the same course was adopted by the petitioners in the connected petitions Without waiting for the arbitrator to hear their objections these petitioners have asked for the issue of the prerogative writs already referred to They aver that the proceedings which have already taken place are illegal because the Provincial Government had no power to amend the scheme originally sanctioned so as to extend the time in which the Corporation might submit claims for betterment contribution They also claim that the proceedings have become altogether void by reason of the fact that the arbitrator has not yet delivered his awards. The latter contention is based on clause 3 of the first schedule of the Arbitration Act of 1940 which requires an arbiter to deliver his award within four months of the date on which he enters upon the reference The petitioners say that the four months should be calculated from the 15th April, 1944, the date on which the new arbitrator announced that he would commence his duties

It is not the practice of the Court to issue a prerogative writ where there is another remedy open to the party It would be wrong to do so Here there is another remedy open to the petitioners Section 29 of the Madras Town Planning Act of 1920 provides a right of appeal from a decision of the arbitrator falling within clause (*c*) or clause (*d*) of sub-section (1) of section 27 to the Chief Judge of the Court of Small Causes in cases arising in the City of Madras. Clause (*c*) refers to decisions on questions relating to injurious effect within the meaning of section 20 and clause (*d*) to the determination of questions relating to betterment contribution

under section 23. Under clause (*d*) the petitioners would have a right of appeal against decisions making their properties liable to betterment contribution. Obviously a property cannot be made liable to the contribution if the scheme under which it is claimed is invalid In these circumstances, we should not be inclined to issue the writs even if the arguments advanced in support of the applications were sound ; but as we consider them to be unsound we will state our reasons.

The contention that the Provincial Government had no power to extend the period in which the betterment contribution could be claimed is answered by section 15 (2) which, as we have already indicated, states that the Provincial Government may at any time by notification vary or revoke a scheme sanctioned under section 14. Its power to vary or revoke is entirely unrestricted, except that before acting it shall give the persons affected an opportunity of preferring objections. Mr. Thiruvenkatachari on behalf of the petitioners has suggested that in amending the scheme, the Provincial Government was acting in exercise of a power delegated to it, and he says that a delegated authority cannot be exercised to enlarge a period of limitation with retrospective effect It is obvious that when acting under the provisions of the Town Planning Act, the Provincial Government is not exercising a power " delegated " to it It is exercising the power conferred upon it directly by statute. At any stage the Provincial Government had power to amend the scheme by enlarging the time for submission of claims for contribution That is the plain meaning of section 15 (2) We may add that the Provincial Government took steps to amend the original scheme in this respect before the two years allowed by clause 22 of the original scheme for the submission of claims had expired. Moreover, no one filed an objection to the draft notification It is also to be noted that under section 23 no time need be fixed for the making of a claim.

There is no more substance in tne argument based upon the provisions of the Arbitration Act. Section 46 of that Act says that its provisions, except sub-section (1) of section 6 and sections 7, 12 and 37, shall apply to an arbitration under another enactment for the time being in force, as if the arbitration were pursuant to an enactment and as if that other enactment were an arbitration agreement ; but the section adds :

> " except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder "

It is to be doubted whether this section covers an " arbitration " under the Town Planning Act It is true that the Town Planning Act speaks of " the arbitrator " ; but it does not require him to give an award. He is required to give a decision which is appealable We will, however, assume that section 46 of the Arbitration Act of 1940 applies to Chapter V of the Town Planning Act, but it can only apply in so far as the Town Planning Act is not inconsistent with it As we have just indicated, it is inconsistent in important respects

Rule 3 of the first schedule of the Arbitration Act of 1940 says that the arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow The petitioners' argument is that by reason of section 46, this rule is imported into arbitrations under Chapter V of the Town Planning Act. In the first place, rules as to the conduct of proceedings under the Town Planning Act have been framed and they govern the proceeure to be followed, not the rules in the first schedule of the Arbitration Act In the second place, to apply rule 3 of the first schedule of the Arbitration Act would be to render proceedings under the Town Planning Act futile We have been told that the claims for contribution in the scheme relating to the Lloyds Road area number over a thousand If the date for entering upon the arbitration had to be taken as the 15th April, 1944, it would be a physical impossibility for the arbitrator to give his decisions within four months. It is argued that he could apply to the Court for extension of time, but the Act does not specify the Court to which such an application could be made If rule 3 does apply—in our opinion it does not—the only rational way of applying it would

be to consider the four months period as commencing from the date on which the arbitrator entered upon the hearing of a particular claim We do not feel called upon to enter upon further discussion of the question because the exception contained in section 46 of the Arbitration Act takes the Town Planning Act out of its purview.

These findings mean the dismissal of all the applications except C M A No 6057 of 1945 and C R P. No 1557 of 1945 The petitioners in each case now under dismissal must pay two sets of costs, one set to the Corporation of Madras and one set to the Provincial Government There will be no order as to costs in the stay petitions

We leave open for argument before the arbitrator all the questions raised by the petitioners in their written statements except the questions which we have decided in this judgment

We now turn to the two remaining matters Here the petitioner is the Corporation of Madras In C M P No 6057 of 1945, the Corporation asks for a writ prohibiting the Chief Judge of the Court of Small Causes, Madras, from hearing an appeal from a decision of the arbitrator under section 29 of the Town Planning Act The revision petition asks for the revision of an order of the Chief Judge of the Court of Small Causes holding that his powers under the Town Planning Act are not restricted by section 30 of the Arbitration Act For the Corporation it is said that an appeal from the arbiter under the Town Planning Act only lies when the objection is one falling within section 30 of the Arbitration Act That section says that an award shall not be set aside except (*a*) when the arbitrator or umpire has misconducted himself, or (*b*) when an award has been made after the issue of an order by the Court superseding the arbitration or after the arbitration proceedings have become invalid under section 35, or (*c*) when the award has been improperly procured or is otherwise invalid The argument entirely overlooks the provisions of section 29 That section states exactly what decisions are appealable. Section 30 certainly does not restrict an appeal under section 29 of the Town Planning Act which is here the governing enactment

Learned counsel for the Corporation has also pointed to section 32 and says that this section is a bar to the present action Having ignored section 29 of the Town Planning Act he now ignores the exception incorporated in section 46 of the Arbitration Act It is surprising that these petitions were ever filed. They are also dismissed with costs in favour of the contesting respondent.

V S. *Petitions dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR JUSTICE RAJAMANNAR

Kesava Pandithan .. *Appellant**

v.

Govindan and others .. *Respondents.*

Hindu Law—Joint family—Deaf and dumb member becoming sole surviving member of the family—Right to take and enjoy the whole estate

A member of a joint Hindu family who is deaf and dumb and on that account is disqualified from enjoying his share in the family estate is nevertheless a member of the coparcenary and as such is entitled to take and enjoy the whole estate when he becomes the sole surviving member of the family. There is no text which prevents him from so taking

Krishna v *Sami*, (1885) I L R 9 Mad 64 (F B), *Muthuswami Gurukkal* v *Meenammal*, (1919) 38 M L J 291 I L R 43 Mad 464, *Amirthammal* v *Vallimayil Ammal*, (1942) 2 M L J 292 : I L R

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* L. P A. No. 46 of 1945 1st February, 1946.

(1942) Mad 807 (F B), followed , *Pudiava Nadan* v *Pavanasa Nadan,* (1922) 43 M L J. 596 . I L R. 45 Mad 949 (F B), not followed

When a disqualified member becomes the sole surviving member of the family, he constitutes a fresh stock of descent and the property goes to his heir and not to the heir of the member of the joint family who was the last to die before him

Mool Chand v *Chahta Devi,* I L R (1937) All 825 (F B), approved.

Appeal under clause 15 of the Letters Patent against the decree and judgment of Somayya, J , dated 26th April, 1945, in S A No 759 of 1944, preferred against the decree of the Court of the Subordinate Judge, Cuddalore, in A S No 144 of 1943 (O S. No 80 of 1941, District Munsiff's Court, Kallakurichi).

K. Srinivasan for Appellant.

S V Venugopalachari and *S Venkatesan* for Respondents.

The Court delivered the following

JUDGMENTS *The Chief Justice*—The real question in this appeal is whether a member of a joint Hindu family who is disqualified from enjoying his share in the family estate by reason of the fact that he is deaf and dumb is entitled to take and enjoy the whole estate when he becomes the sole surviving member of the family.

On the 27th September, 1939, one Muniyan, who had been deaf and dumb from birth, settled upon the plaintiff, the husband of his sister, property which had formed the estate of the joint family of which he was a member The joint family consisted of himself and his brother Manickam, who died in or about the year 1919. The first and second defendants are the sons of Mari, the divided brother of the father of Muniyan and Manickam On the death of Manickam, they took possession of the property as his heirs, Muniyan being excluded by reason of his affliction. As the result of the settlement the plaintiff sued in the Court of the District Munsiff of Kallakurichi for a decree for possession The District Munsiff held that by reason of his disqualification, Muniyan had no power to settle the estate upon the plaintiff. He also held that Muniyan was incapable of understanding the document and forming a rational judgment as to its effect The plaintiff appealed to the Subordinate Judge of Cuddalore, who held that Muniyan had the right to convey the property to the plaintiff, relying on the decision of this Court, in *Amirthammal* v *Vallimayil Ammal*[1] Without considering whether Muniyan was mentally capable of making the settlement, the Subordinate Judge granted the plaintiff a decree for possession. The first and second defendants then appealed to this Court Their appeal was heard by Somayya, J , who, before dealing with the points of law involved, called for a finding from the Subordinate Judge on the question of Muniyan's contractual capacity The Subordinate Judge found that Muniyan fully understood what he was doing and was capable of forming a rational opinion as to the effect of the settlement upon his own interests The Subordinate Judge's finding on the question of contractual capacity is final.

Mr. Justice Somayya did not consider that *Amirthammal* v *Vallimayil Ammal*[1] had decided that a disqualified person who happens to be the last surviving coparcener of a joint Hindu family is, by reason of survivorship, entitled to enjoy the family estate and was of the opinion that the provisions of the Hindu Inheritance (Removal of Disabilities) Act, 1928, precluded the plaintiff from recovering the property from the first and second defendants. The question whether the plaintiff could dispossess the defendants after the death of Muniyan did not arise and therefore the learned Judge did not deal with it In view of the opinion which he had formed of the effect of the Hindu Inheritance (Removal of Disabilities) Act, the learned Judge allowed the appeal, but granted a certificate under clause 15 of the Letters Patent which has entitled the plaintiff to prefer the present appeal

Section 2 of the Hindu Inheritance (Removal of Disabilities) Act provides that notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance or from any right or share

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1 (1942) 2 M L J 292 I L R (1942) Mad 807 (F B.)

in the joint family property by reason only of disease, deformity, or physical or mental defect, but section 3 states that nothing in the Act shall affect a right which has accrued or a liability which has been incurred before the commencement of the Act. Admittedly if the estate did not devolve upon Muniyan on the death of Manickam, section 3 of the Act would preclude the plaintiff from recovering the property from the first and second defendants, but it is also accepted that if on Manickam's death, the estate devolved upon Muniyan as the surviving member of the joint family, the settlement in favour of the plaintiff must be given effect to.

I find myself unable to share the opinion of my brother Somayya, J, that the decision in *Amirthammal* v *Vallimayil Ammal*[1] does not provide the answer to the question now under discussion That case was decided by a Full Bench of which we were both members The question there was whether a disqualified person has the status of a coparcener under the Hindu Law notwithstanding that he is excluded from the enjoyment of his share It was held that he has He is by birth a coparcener and sons born to him, if unafflicted, are entitled to full rights as members of the family, notwithstanding that he himself is precluded from enjoying his share. The other members of the Court concurred in the judgment which I delivered in that case Its decision involved a detailed examination of the judgments of this Court in *Krishna* v *Sami*[2] *Muthuswami Gurukkal* v *Meenammal*[3] and *Pudiava Nadar* v. *Pavanasa Nadar*[4].

The first of these cases was decided by a Full Bench of five Judges over which Turner, C J, presided It was there held that under the Mitakshara law, the sons of a deaf and dumb member of an undivided Hindu family are entitled to a share of the family estate in the lifetime of their father notwithstanding that they were born after the death of their grandfather. The disqualification of the father did not prevent his sons becoming share enjoyers In *Muthuswami Gurukkal* v *Meenammal*[3] Seshagiri Aiyar, and Moore, JJ, held that the right of a member of a Hindu joint family to share in ancestral property is not lost, but is only in abeyance by reason of a disqualification and that if the disqualified member becomes the sole survivor, he takes the whole estate by reason of survivorship

The judgments in *Pudiava Nadar* v. *Pavanasa Nadar*[4] are in conflict with those delivered in *Krishna* v *Sami*[2] and *Muthuswami Gurukkal* v. *Meenammal*[3]. In *Pudiava Nadar* v *Pavanasa Nadar*[4], the plaintiff had separated from his father who lived with his other three sons, one of whom (the ninth defendant) was afflicted with congenital blindness The father conveyed his property to his son-in-law who conveyed it to the second and third defendants At the time the suit was filed, the father was dead and only two of his sons survived, the plaintiff and the ninth defendant The defendants contended that the fact that the ninth defendant was alive was a bar to the suit The Court (Schwabe, C J, Oldfield and Coutts-Trotter, JJ), regrettably refused to follow *Krishna* v *Sami*[2] and rejected this plea

In *Amirthammal* v *Vallimayil Ammal*[1], it was held that *Krishna* v *Sami*[2] was the binding authority as it had been decided by a Bench of five Judges In following *Krishna* v *Sami*[2], the Court expressed its full agreement with the principle laid down therein and disagreement with *Pudiava Nadar* v *Pavanasa Nadar*[4] as that decision was founded on a false premise, namely, that a disqualified person is not a co-sharer. The rejection of *Pudiava Nadar* v *Pavanasa Nadar*[4], in itself indicates the acceptance of the opinion expressed in *Muthuswami Gurukkal* v *Meenammal*[3] that on the death of the other members of the family, the disqualified member becomes entitled to the estate by survivorship and it was quoted in *Amirthammal* v. *Vallimayil Ammal*[1] with approval

Three other High Courts have also held that a disqualified person takes the family estate when he is the last of the coparceners, namely, the Bombay High Court

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1 (1942) 2 M L J 292 I L R (1942) Mad 807 (F B)
2 (1885) I L R 9 Mad 64 (F B)
3. (1919) 38 M L J 291 I.L R 43 Mad 464
4 (1922) 43 M L J 596 I L R 45 Mad. 949 (F B)

in *Vithaldas Govindram* v. *Vadilal Chhaganlal*[1], the Allahabad High Court in *Mool Chand* v. *Chahta Devi*[2] and the Patna High Court in *Musammat Dilraj Kuari* v *Rikheswar Ram Dube*[3] The Allahabad case was decided by a Full Bench which expressly accepted the decision in *Muthuswami Gurukkal* v *Meenammal*[4].

If a disqualified person is a member of the coparcenary—and so far as this Court is concerned it is now well settled that he is—it would be unjust to hold that he is disqualified from enjoying the estate when he happens to be the sole surviving member of the family There is no text which prevents him from so taking and to hold otherwise, would mean that the whole estate would devolve on heirs outside the family, if there were any and if not it would escheat to the Crown It is one thing to say that an afflicted member shall not enjoy his share when there are other members of the joint family alive and quite another thing to say that he shall have no right in the estate when he happens to be the surviving member of the family. If he is not competent to manage the estate, the Court can appoint a guardian. I respectfully agree with the statement in *Mool Chand* v *Chahta Devi*[2], that when a disqualified member becomes the sole surviving member of the family he constitutes a fresh stock of descent and the property goes to his heir and not to the heir of the member of the joint family who was the last to die before him

As I hold that *Muthuswami Gurukkal* v *Meenammal*[4] was rightly decided, it follows that in my opinion the decree of the Subordinate Judge should be restored with costs throughout.

Lakshmana Rao, J.—I agree.

Rajamannar, J—I agree

V S ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT .—MR. JUSTICE PATANJALI SASTRI AND MR JUSTICE BELL

Mahankali Subba Rao . *Appellant**

v.

Jalasutram Audinarayanamurty and others *Respondents.*

Provincial Insolvency Act (V of 1920), sections 37, 43 and 61 (5)—Failure of insolvents to apply for discharge within due time—Annulment of adjudication—Properties vested in the Official Receiver under S, 37—Later review by Court and order revesting properties in insolvents—Legality

When an adjudication is annulled on the ground that the insolvents had not fulfilled their duty by applying for their discharge within the time fixed by the Court, it would not be a proper exercise of discretion for the Court to revest the properties in the insolvents, for that would be allowing the insolvents to take advantage of their own default It is obvious from the provisions of the Provincial Insolvency Act that the creditors who had already proved their debts would be seriously prejudiced by such an order, as under section 61 (5) of the Provincial Insolvency Act such creditors alone would be entitled to be rateably paid out of the amount realised by the assets of the insolvents, if the administration in insolvency were to continue, whereas, if the properties were revested in the insolvents, there would be nothing to prevent other creditors who had obtained decrees subsequent to the annulment to come under section 73, Civil Procedure Code, and claim rateable distribution out of the assets realised in execution of any one decree against the insolvents.

The respondents were adjudicated insolvents in 1935 In 1937 the adjudication was annulled on the ground that the insolvents did not file their application for discharge within time In 1942, the order was confirmed and the properties of the insolvents were vested in the Official Receiver under section 37 for distribution amongst creditors of the insolvent In 1943 the insolvents applied for reviewing the previous order and for revesting the properties in themselves, alleging that all creditors except two had been satisfied They also expressed their willingness to deposit in Court the amount due to the unsatisfied decrees of the two creditors The Judge passed an order revesting the properties.

1 A I R 1936 Bom 191
2 I L R (1937) All 825 (F B)
3 (1934) I L R 13 Pat 712
4 (1919) 38 M L J 291 I L R 43 Mad. 464

* A A O Nos 507 and 665 of 1944 and C R P No 1751 of 1944 22nd January, 1946

in the insolvents on condition of their depositing the required amounts for payment to the unpaid creditors On appeal against that order,

Held, that the order would clearly operate to the prejudice of the creditors who had obtained decrees against the insolvents, and there was no justification for the order passed at the instance of the insolvents

Appeals against the order of the District Court of West Godavari at Ellore, dated 4th March, 1944, and 10th July, 1944, and made in C M. P. No 290 of 1943, and I A. No 560 of 1944, respectively, in I. P No. 18 of 1935

C. M A No 507 of 1944

Kasturi Seshagiri Rao for Appellant

B V Subrahmanyam, for Respondents.

C M A. No. 665 and C R. P No 1751 of 1944

B V Subrahmanyam for Appellant (Petitioner)

V. Rangachari for Respondents

The Judgment of the Court was delivered by

Patanjali Sastri, J—The respondents were adjudicated insolvents on their own petition I P No 18 of 1935 on 16th October, 1935 This adjudication was annulled by the learned Judge in chambers on 19th November, 1937, on the ground that the insolvents did not file their adjudication for discharge within the time fixed by the Court No order was made in regard to the property of the insolvents which had been vested in the Official Receiver There was an application for review of this order by two creditors and allowing the application the learned Judge passed an order on the 17th of August, 1942, confirming his order of annulment and vesting the insolvents' properties in the Official Receiver under section 37 for distribution amongst the creditors of the insolvent On 26th January, 1943, the insolvents applied for reviewing the order dated 17th August and revesting the property in themselves alleging that all the creditors who had not obtained decrees except creditors Nos 7 and 17 were satisfied, that the decree-holders were taking execution proceedings on foot of the decrees obtained by them and that, accordingly, there was no need to continue the vesting of the properties in the Official Receiver under the previous order dated 17th August They also declared their willingness to deposit the amount due to the 7th and 17th creditors in Court so that their claims might also be satisfied The learned Judge accepted the suggestion and passed an order revesting the properties in the insolvents on condition that they deposited in Court on or before 18th March, 1944, a sum of Rs 2,450 towards the sums that might be found due to creditors Nos 7 and 17 He directed the Official Receiver's commission and audit fee to be deducted from the amounts lying in deposit with him. It is from this order that the first creditor has preferred this appeal

Mr Kasturi Seshagiri Rao for the appellant has challenged the correctness of this order on the broad ground that the learned Judge, having annulled the adjudication of the insolvents on the ground of their default under section 43 of the Provincial Insolvency Act ought not to have revested the insolvents' properties in them, thereby driving the creditors who have proved their debts to the remedies under the general law and exposing them to possible rival claims by way of application for rateable distribution or otherwise by other creditors who might have obtained decrees against the insolvents after the date of the annulment on the 19th of November, 1937, but would not be entitled to proceed against the properties if they had continued to be administered by the Official Receiver as appointee under section 37 of the Act The learned counsel also pointed out certain errors into which the learned Judge has fallen in arriving at the figure of Rs 2,450 as due to creditors Nos 7 and 17.

We are of the opinion that the contention on behalf of the appellant is correct and must prevail When an adjudication is annulled on the ground that the insolvents had not fulfilled their duty by applying for their discharge within the time fixed by the Court it would not be a proper exercise of discretion on the part

of the Court to revest the properties in the insolvents, for that would be allowing the insolvents to take advantage of their own default It is obvious from the provisions of the Provincial Insolvency Act that the cerditors who had already proved their debts would be seriously prejudiced by such an order, as under section 61 (5) such creditors alone would be entitled to be rateably paid out of the amount realised by the assets of the insolvents if the administration in insolvency were to continue , whereas if the properties were revested in the insolvents there would be nothing to prevent other creditors who have obtained decrees subsequent to the annulment to come in under section 73 of the Civil Procedure Code and claim rateable distribution out of the assets realised in execution of any one decree against the insolvents In the present case the appellant who is the first creditor as well as creditors Nos 8 and 19 had obtained decrees against the insolvents, and the appellant and the 19th creditor have actually proved their debts The order made by the learned Judge would clearly operate to their prejudice and there is, in our opinion, no justification for the learned Judge making the order dated 4th March, 1944, at the instance of the insolvents.

It is unnecessary in this view to go into the errors of calculation pointed out in the course of the arguments before us

The result is that the appeal is allowed, the order dated 4th March, 1944, is set aside and the order passed by the learned Judge on 17th August, 1942 will, be restored The appellant will have his costs here and the Official Receiver in the Court below against the respondents 1 and 2

The connected appeal C. M A No 665 of 1944 is not pressed and is dismissed with costs

C R P No. 1751 of 1944 which is filed only as an alternative to the C M.A. No 665 of 1944 will be dismissed without costs

K.C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE LAKSHMANA RAO.

T. Ponnirula Pillai *Appellant**

v.

The Western India Oil Distributing Company, Limited . *Respondent*

Civil Procedure Code (V of 1908), Order 23, rule 1—Applicability—Claim to set-off withdrawn without getting leave to file fresh suit—Subsequent suit not maintainable

Principal and agent—Commission—Claim to set-off raised in suit by principal—Withdrawal of claim by compromise decree—Subsequent claim for commission—Starting point for account

A defendant who prefers a counter-claim is in the position of a plaintiff Where such defendant allows a decree to be passed declaring his set-off to be withdrawn " with liberty to be settled and disposed of by mutual consent of parties out of Court " and there is no permission to institute fresh proceedings he is precluded from instituting a fresh suit in respect of such claim.

Where an agent in a suit by his principal counter-claimed for arrears of commission due to him and allowed a compromise decree to be passed declaring his set-off to be withdrawn, in respect of commission for the subsequent period the starting point of the account will be the date of the written statement claiming set-off in the prior suit and not the date of the compromise decree declaring the claim withdrawn

On appeal from the judgment and decree of the Hon'ble Mr Justice Clark, dated 13th December, 1944 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O S No 108 of 1944

N K Mohanarangam Pillai and *M V Gopalaratnam* for Appellant

V. Radhakrishnayya for Respondent

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* O S Appeal No. 8 of 1945 23rd January, 1946

The Judgment of the Court was delivered by

The Chief Justice —The plaintiff in the action is the appellant He sued on the Original Side of this Court for an account of moneys alleged to be due to him by way of commission At all times material to the suit, the plaintiff was the chief agent of the defendant company for the sale of petrol and fuel oil in the southern part of the Madras Presidency He was appointed under an agreement in writing and the period of the agency was fixed at ten years from the 29th May, 1933. The contract provided that the plaintiff was to have a commission on every gallon of petrol or oil sold, whether the sales were through dealers or effected by the company direct

The plaintiff was a shareholder in the company and in 1937 had failed to pay the final call due in respect of his shares In these circumstances, the defendant forfeited his shares and filed a suit in the Bombay High Court to recover some Rs 36,000, the amount of the final call On the 15th November, 1937, the plaintiff filed a written statement in which he claimed to set off against his liability for calls, the interest on a loan of Rs 1,25,000 which he had granted to the company and what was due to him by way of commission from the 30th June, 1935 On the 19th January, 1943, the parties agreed to a settlement of the Bombay suit The agreement was in these words

" 1 Order that the defendant do pay to the plaintiff the sum of Rs 29,893-0-3 (Rupees twenty-nine thousand eight hundred and ninety-three, anna nil and pies three) only being the amount of unpaid calls

2 Order that forfeiture of the defendant's 2,491 shares in the plaintiff company be annulled and set aside

3 Declare that the plaintiff company shall have first charge or lien on the ordinary 2,491 shares of the defendant in the plaintiff company as a security for payment of the said sum of Rs 29,893-0-3

4. Declare that the claims of set-off under various heads by the defendant do stand withdrawn with liberty to be settled and disposed of by mutual consent of parties, out of Court.

5 Each party to bear his and their costs of the suit and counter-claim "

On the 14th June, 1943, a formal decree was passed by the Bombay High Court in accordance with the terms of the agreement, except that the clause with regard to the withdrawal of the defendant's set-off read as follows

"doth further order that the claims of set-off under various heads made by the defendant be and they are hereby allowed to be withdrawn "

The words " with liberty to be settled and disposed of by mutual consent of parties, out of Court " were omitted because the Bombay High Court considered that no permission was required to enable parties to settle a matter out of Court, an opinion which is not open to question

On the 11th October, 1943, the plaintiff wrote to Mr K P Ghiara, the director who had signed the agreement for compromise, asking that his claims against the company should be settled On the 15th November, 1943, the plaintiff received a letter from the defendant's secretary to the effect that as the claim for set-off had been withdrawn without permission given to him by the Court to file a fresh action in respect of the matter, he was precluded from making any claim against the company This is an astonishing letter We shall deal presently with the question of law involved ; but accepting that the consent decree operated in the way the defendant suggested, it was certainly not an honest attitude for the defendant to take up The company had consented to the plaintiff withdrawing his counter-claim on the understanding that there would be a mutual settlement out of Court. Instead of having the accounts investigated and the true position discovered, the defendant refused to go into the matter and took shelter behind a technical plea

On the 14th April, 1944, the plaintiff instituted the present action In addition to the plea that the suit was not maintainable because permission had not been obtained from the Bombay High Court to institute a fresh suit in respect of the claim to set-off, the defendant company pleaded that this Court had no jurisdiction to try the action and that the claim was barred by limitation The learned Judge

(Clark, J.) held aginst the defendant on the pleas of want of jurisdiction and limitation, but found for the defendant on the plea that the suit was not maintainable by reason of the failure to obtain permission from the Bombay High Court, but only in so far as his claim for commission related to the period prior to the 15th November, 1937, the date on which the plaintiff had filed his written statement in the Bombay suit The learned Judge held that the plaintiff was entitled to an account of the commission due to him subsequent to that date The plaintiff appeals against the decision of the learned Judge in so far as it concerns his claim to an account for the period prior to the 15th November, 1937 The defendant has accepted the learned Judge's findings with regard to jurisdiction and limitation, but he has filed a memorandum of cross-objection on the question of the starting point of the account which has been ordered The defendant says that the starting point should not be the 15th November, 1937, but the 20th January, 1943, the date of the compromise decree

Learned counsel for the plaintiff has contended that the compromise decree must be read in conjunction with the agreement for compromise and that therefore the compromise decree must be deemed to have incorporated the whole of clause 4 of the agreement, that is, it must be read as embodying the words "with liberty to be settled and disposed of by mutual consent of parties, out of Court" This argument is based on the decision of a Full Bench of this Court in *Narayana Tantri* v. *Nagappa*[1]. We agree that the judgment in that case does support this contention; but we do not consider that reading these words into the compromise decree will alter the position Even if they are read into it, they do not give the Court's sanction to the filing of a fresh suit to enforce the claim to set-off If the defendant is to be regarded as being in the position of a plaintiff in the Bombay suit with regard to his plea of set-off, permission of the Court to withdraw that claim was necessary to enable him to file a fresh suit Order 23, rule 1 precludes a plaintiff who withdraws from a suit or abandons a claim without liberty being given to him to file a fresh suit, from instituting a fresh suit unless permission to withdraw has been granted with liberty to institute a fresh suit.

A defendant who prefers a counter-claim is in the position of a plaintiff. Order 8, rule 6 says that where the defendant claims to set off against the plaintiff's demand any ascertained sum or money legally recoverable by him from the plaintiff, the written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect of both the claim and the set-off Therefore, the plaintiff should have obtained the Bombay High Court's permission to institute a fresh suit when he withdrew his claim to set-off if he had intended to institute legal proceedings should the negotiations for settlement outside the Court fail. He allowed the decree to be passed declaring his set-off to be withdrawn without permission to institute fresh proceedings and, as we have indicated already, reading into the decree all the words in clause 4 of the agreement does not help him

The appeal must be dismissed; but in view of the unreasonable attitude taken up by the defendant company, we make no order as to costs.

The decision of the learned Judge with regard to the date from which the account should be taken was clearly right and the memorandum of cross-objections has not been seriously pressed

It is dismissed with costs

K S *Decision affirmed.*

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1 (1917) 34 M L J 515 (F B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Governor-General in Council having office at New Delhi .. *Appellant**

v.

T. M. Krishnaswami Pillai .. *Respondent.*

Civil Procedure Code (V of 1908), sections 79 and 80 (as amended on the passing of Government of India Act, 1935)—Suit filed against Secretary of State after notice—Subsequent amendment by substituting the Governor-General in Council as defendant—If maintainable without fresh notice under section 80 of the Civil Procedure Code.

Government of India Act (1935), section 240 (3)—Action for wrongful dismissal—Relief which can be obtained.

A notice of suit under section 80 of the Civil Procedure Code on behalf of a dismissed chief signaller in the postal department at Kumbakonam was addressed to (1) The Chief Secretary to the Central Government, (2) The Political Secretary to the Central Government, (3) The Chief Secretary to the Provincial Government, (4) The Political Secretary to the Provincial Government, (5) The Collector of Tanjore, (6) The Postmaster-General, Madras, and (7) The Director-General of Posts and Telegraphs. It called upon them to take notice that a suit would be instituted against the Secretary of State, if the reliefs claimed were not granted within two months. On 15th April, 1943, a suit against the Secretary of State for India represented by the Collector of Tanjore was filed. On 30th August, 1943, the Government Pleader disputed the maintainability of the suit, because, as the result of the amendment of sections 79 and 80 of the Code of Civil Procedure following the passing of the Government of India Act, 1935, the Governor-General in Council and not the Secretary of State was the proper defendant. Thereupon the respondent filed an application asking to be allowed to amend the plaint by substituting the Governor-General in Council for the Secretary of State. The application was granted by an order dated the 30th September, 1943. The plaintiff did not serve a fresh notice under section 80 and relied on the old notice.

Held, as the notice relied on stated that the suit would be instituted against the Secretary of State for relief against him and there was no reference in it to the Governor-General in Council the suit as amended was unsustainable. The fact that the officials on whom the notice is actually to be served are the same makes no difference. Section 80 of the Civil Procedure Code is express and explicit and admits of no implications or exceptions, and it imposes a statutory and unqualified obligation on the Court.

Bhagchand Dagadusa v. *Secretary of State for India in Council*, (1927) 53 M.L.J. 81 : L.R. 54 I.A. 338 : I.L.R. 51 Bom. 725 (P.C.), relied on.

Held further, when an action is brought under sub-section (3) of section 240 of the Government of India Act a declaration that the dismissal is void and inoperative cannot be given. The only relief which the Court can grant is a decree for damages for wrongful dismissal.

Secretary of State for India v. *I. M. Lall*, (1945) 2 M.L.J. 270 : (1945) F.L.J. 129 : (1945) F.C.R. 103, relied on.

(Certificate under section 205 of the Government of India Act, 1935, issued.)

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, dated 31st July, 1944, in O.S. No. 18 of 1943.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

K. S. Desikan for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is the Governor-General in Council. The appeal arises out of a suit filed by the respondent in the Court of the Subordinate Judge of Kumbakonam. He was the chief signaller in the Head Post Office at Kumbakonam. By an order dated the 4th April, 1941, which was confirmed on appeal by the Postmaster-General, Madras, the respondent was dismissed from Government service. He filed the suit for a declaration that the order of dismissal was "illegal, void and inoperative" and for other reliefs. The Subordinate Judge granted the declaration asked for, but refused further relief. The appellant says that the Subordinate Judge erred in granting the respondent a declaration and in rejecting a plea advanced by the plaintiff that the suit was not maintainable because the provisions of section 80 of the Civil Procedure Code had not been complied with.

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* Appeal No. 558 of 1944. 29th January, 1946.

In or about the month of October, 1939, the respondent was suspected of having misappropriated monies which had come into his hands in the course of his employment, and consequently was suspended by the Superintendent of Post Offices, Tanjore division, who reported the matter to the police The result was that the police prosecuted the respondent for criminal breach of trust After a lengthy hearing the respondent was acquitted by the Magistrate on the 9th September, 1940 The Post Office authorities were not satisfied with the Magistrate's findings and decided to proceed against the respondent departmentally. By an order, dated the 1st March, 1941, the Superintendent framed five charges against him It is unnecessary to set them out in detail It is sufficient to state that they were all charges of dereliction of duty, including a charge of having collected money by the issue of bogus receipts The respondent was called upon to explain the charges within a week of the receipt of the memorandum served upon him and to show cause (1) why a loss to Government of Rs 900 should not be recovered from him; and (2) why he should not be dismissed from service He was informed that a suitable opportunity would be afforded to him if he wished to be heard in person

On the 5th March, 1941, the respondent wrote to the Superintendent acknowledging receipt of the memorandum of charges and asking to be allowed one month's time to offer his defence. The request for further time was based on the assertion that he required the production of documents filed in the proceedings before the Magistrate The request was granted In the letter dated the 7th March, 1941, the Superintendent informed him that he should submit his explanation by the 1st April On the 23rd March, 1941, the respondent wrote to the Superintendent as follows

"With reference to your memo of charge No F-5/13 of 1st March, 1941, I humbly beg to submit that the charges thereon have been elaborately dealt with by the Sub-Divisional Magistrate, Kumbakonam, before whom I stood the trial by a Court of Law for the same charges I was found not guilty of the offence charged, as you are aware of I have at this stage nothing further to submit to you in further proof of my innocence"

On the 24th March, the Superintendent wrote to the respondent reminding him that the time for submitting his explanation expired on the 31st March, and that he should submit it so as to reach the Superintendent's office not later than the 1st April, 1941 He was also informed that no further extension of time would be granted to him "on any account."

The respondent ignored this letter and consequently the Superintendent embarked upon the inquiry In a report dated the 4th April, 1941, he held that all the charges had been proved He passed an order directing that the respondent be dismissed from the service with effect from the 1st April, 1941, and that he should pay Rs 600, part of the loss which the Government had suffered The respondent had the right of appeal to the Postmaster-General and he exercised it in a letter addressed to the Postmaster-General on the 21st May, 1941 In paragraph 8 of the letter he said

"The mere fact that I did not choose to give a written explanation for the charges and that I did not avail myself of the opportunity given for a personal hearing cannot be taken as grounds for regarding the charges as proved"

This statement is of importance as the basis of the respondent's suit is that he was not given an opportunity of a personal hearing

The Postmaster-General held that the first charge, which was a comparatively minor one, had not been substantiated, but he held that the other charges had been proved and consequently he confirmed the order of dismissal He reduced, however, the amount which the respondent was ordered to pay to Government from Rs 600 to Rs 200 The respondent addressed the Director-General of Posts and Telegraphs with a view to his re-instatement, but no action was taken as the decision of the Postmaster-General was final

On the 22nd October, 1942, the respondent gave notice of suit under section 80 of the Civil Procedure Code. It was addressed to (1) The Chief Secretary to the Central Government; (2) The Political Secretary to the Central Government;

(3) The Chief Secretary to the Provincial Government; (4) The Political Secretary to the Provincial Government; (5) The Collector of Tanjore, (6) The Postmaster-General, Madras, and (7) The Director-General of Posts and Telegraphs. It called upon them to take notice that a suit would be instituted against the Secretary of State in the Subordinate Judge's Court, Kumbakonam, if the reliefs claimed by him were not granted within two months. For the institution of a suit against the Secretary of State the notice complied with the requirements of section 80, and on the 15th April, 1943, a suit against the Secretary of State for India represented by the Collector of Tanjore was filed On the 30th August, 1943, the Government Pleader disputed the maintainability of the suit as framed, because, as the result of the amendment of sections 79 and 80 of the Code of Civil Procedure, following the passing of the Government of India Act, 1935, the Governor-General in Council and not the Secretary of State was the proper defendant Thereupon the respondent filed an application asking to be allowed to amend the plaint by substituting the Governor-General in Council for the Secretary of State The application was granted by an order dated the 30th September, 1943 The respondent did not serve a fresh notice under section 80, and relied on the notice which he had given on the 22nd October, 1942 The Subordinate Judge held that this was sufficient.

Sub-section (3) of section 240 of the Government of India Act, 1935, states that no person who is in the service of or holds a civil post under the Crown in India shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken with regard to him. In his plaint the respondent averred that no reasonable opportunity had been given to him of being personally heard This plea was accepted by the Subordinate Judge and on this basis he granted the declaration asked for in the plaint The other reliefs claimed by the respondent were a decree for the amount of his salary from the date of his dismissal or for damages for wrongful dismissal and for the recovery of the amount of his security deposit which was Rs 200 The Subordinate Judge held that the respondent was not entitled to a decree in respect of his salary nor was he entitled to damages for wrongful dismissal but he was of the opinion that he was entitled to the return of the security deposit if he happened to be acquitted of charges framed in a fresh departmental inquiry

In *Suraj Narain Anand* v *The North-West Frontier Province*[1], the Federal Court held that a suit for a declaration that a dismissal is void and inoperative lies when the dismissal is under sub-section (2) of section 240 of the Government of India Act. That sub-section states that no civil servant shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed. In the *Secretary of State for India* v *I M Lall*[2], the Federal Court held that such a declaration cannot be given when the action is brought under sub-section (3) In that case the proper remedy is by way of a suit for damages for wrongful dismissal

In *Venkat Rao* v *Secretary of State for India in Council*[3], the Privy Council held that the dismissal of a civil servant in utter disregard of the procedure prescribed by the rules will not give a right of action for wrongful dismissal because a civil servant holds office during His Majesty's pleasure. Sub-section (1) of section 240 of the Government of India Act, 1935, declares that civil servants hold office during His Majesty's pleasure, but in *Secretary of State for India* v *I M. Lall*[2], the Federal Court held that the decision in *Venkat Rao* v *Secretary of State for India in Council*[3], no longer applies when the grievance falls under sub-section (3) of section 240 of the Constitution Act because the sub-section imposes a statutory obligation to be carried out before dismissal is effected The judgment of the Federal Court in the *Secretary of State for India* v *I M Lall*[2], had not been delivered when the Subordinate Judge gave his judgment in the present action, but the Federal Court's judgment is binding on us and consequently we must hold that the only relief

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1 (1942) 1 M L J 77 (1941) F C R 37 I.L.R (1942) Lah 692 4 F L J 22 (F C)
2 (1945) 2 M L J 279 (1945) F L J 129 (1945) F C R 103 (F C)
3 (1937) 1 M L J 529 L R 64 I A 55 I.L.R (1937) Mad. 532 (P C)

which the Court can grant, if satisfied with the plaintiff's case, is a decree for damages for wrongful dismissal.

We do not, however, accept the finding of the Subordinate Judge that a reasonable opportunity was not given to the respondent of being heard. The memorandum of charges which was served on the respondent on the 3rd March, 1941, informed him in the plainest possible language that he would be given a suitable opportunity of being heard if he wished to be heard At no stage did he indicate even an intention of being present at the inquiry His letter of the 23rd March, 1941, in which he referred to his acquittal by the Magistrate indicates that he was content to rely on the proceedings in the Magistrate's Court The statement which we have quoted from paragraph 8 of the respondent's letter to the Postmaster-General appealing from the Superintendent's order is in reality an admission that he deliberately refrained from availing himself of the opportunity of being heard In the course of his evidence the respondent said that if this statement implied that he had been given an opportunity of making a written explanation and of a personal hearing, it did not correctly represent what he had mentioned to the person who prepared the appeal for him, because it had always been his contention that no such opportunity had been given to him This statement was made in cross-examination on the 26th June, 1944, but in further cross-examination on the 19th July he stated that his appeal to the Postmaster-General was prepared on his instructions and that he signed it after perusing the contents. These statements are contradictory

We have no doubt that the respondent did not want a personal hearing and was content to rest his case on the Magistrate's decision in the criminal case He was given full opportunity of showing cause against the action proposed to be taken with regard to him and of having a personal hearing The statutory obligation which section 240 (3) imposed upon the department had been fulfilled and consequently there was no cause of action.

We consider that the appellant's objection to the notice under section 80 of the Code of Civil Procedure must also prevail In *Bhagchand Dagadusa* v *Secretary of State for India in Council*[1], the Privy Council held that section 80 is express and explicit, it admits of no implications or exceptions, and it imposes a statutory and unqualified obligation upon the Court. The section requires the intending plaintiff to state *inter alia* the relief which he claims As we have indicated, the notice which the respondent served stated that the suit would be instituted against the Secretary of State for relief against him There is no reference to the Governor-General in Council in the letter and therefore it cannot be read as claiming relief against the Governor-General in Council The fact that the officials on whom the notice is actually to be served are the same makes no difference. Here the Court can only have regard to what is stated in the notice.

For these reasons the appeal is allowed and the suit is dismissed with costs here and below. As it was filed *in forma pauperis* the respondent must pay to Government the court-fee due on the plaint

The learned counsel has asked for a certificate under section 205 of the Government of India Act, 1935, and one will issue

K S. *Appeal allowed.*

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1. (1927) 53 M L J 81 L R 54 I A 338 · I L R 51 Bom. 725 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI

Mutyala Venkatramayya *Appellant**

v.

Tanguturi Venkatasubbayya and others *Respondents*

Limitation Act (IX of 1908), sections 5 and 29 (2)—Application under Madras Agriculturists' Relief Act (IV of 1938)—Dismissal—Revision—Amended Act (1943), section 25-A coming into force—Appeal on dismissal of revision—Application to excuse delay under section 5, Limitation Act—Whether provisions of section 29 of the Limitation Act excluded the application of section 5

All that section 29 (2) of the Limitation Act lays down is that where a special or local law prescribes a special period of limitation the excluded provisions of the Limitation Act shall not apply In section 25-A, newly introduced into the Madras Act (IV of 1938), though a right of appeal is given, no period of limitation different from the period prescribed by the first schedule to the Limitation Act is indicated Therefore the provisions of section 29 (2) of the Limitation Act have no application so as to exclude the provisions of section 5 of the Limitation Act from being applied to appeals under the special law

A debtor's application for relief under the provisions of the Madras Agriculturists' Relief Act, was dismissed on some legal ground, and because of the lack of a right of appeal under the then existing provisions of the Act he had to file a revision petition to the High Court But in the meantime owing to the amendment of the Act in 1943 by the addition of the new section 25-A he became entitled to appeal against that order and preferred an appeal after the rejection of his revision petition and also prayed that the delay in filing the appeal should be excused under section 5 of the Limitation Act

Held, that section 5 of the Limitation Act would apply to the case and that the petition had to be disposed of on the merits

Appeal against the order of the Court of the Subordinate Judge, Narsapur, dated 12th July, 1944, and made in unregistered Appeal of 1943 sought to be preferred against the order of the Court of the District Munsiff, Bhimavaram, dated 31st March, 1942, in C M P No. 392 of 1941 in O S No 51 of 1932, etc.

P. Satyanarayana Rao and *G Chandrasekhara Sastri* for Appellant.

V. Viyyanna for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellant in the appeal who is also the petitioner in the civil revision petition was a debtor who applied to the Court of the District Munsiff of Bhimavaram for relief under the provisions of Madras Act IV of 1938 The application was dismissed on a legal ground and as there was then no right of appeal under the Act, the debtor moved this Court in revision By the time the revision petition came to be heard here, Madras Act IV of 1938, had been amended and a right of appeal had been given under the new section 25-A which provides that an order of the kind by which the petitioner was aggrieved should be subject to appeal "as if it was an order falling under section 47 of the Civil Procedure Code" The revision petition having been rejected on the ground that an appeal lay, the debtor moved the Subordinate Judge of Narsapur to excuse the delay under section 5 of the Limitation Act and to admit an appeal against the original order to the District Munsiff The learned Subordinate Judge has dismissed the application to excuse the delay and has consequently rejected the appeal. Against the order refusing to excuse the delay the present revision petition is preferred and against the dismissal of the appeal the present second appeal is preferred

The only ground on which the learned Subordinate Judge has rejected the application to excuse the delay is on the strength of a contention based on section 29 of the Limitation Act Section 29 (2) provides that where a special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal

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* A A O No 378 of 1944 and C. R P No 1746 of 1944 — 11th January, 1946.

or application by any special or local law (*a*) the provisions contained in section 4, sections 9 to 18 and section 22 shall apply . . . . and (*b*) the remaining provisions of this Act shall not apply The learned Subordinate Judge has read this provision of law as having enacted that none of the excluded provisions shall apply to any suit, appeal or application under any special or local law This is clearly erroneous All that section 29 (2) lays down is that where a special or local law prescribes a special period of limitation, the excluded provisions of the Limitation Act shall not apply. For instance, it has been held that under section 20 of Madras Act IV of 1938 a special period of limitation is laid down for the filing of an application under section 19 by a person who has obtained a stay under section 20, and consequently section 5 of the Limitation Act cannot be applied to extend the period therefor prescribed under the special law In section 25-A newly introduced into this Act, though a right of appeal is given, no period of limitation different from the period prescribed by the first schedule to the Limitation Act is indicated. Therefore the provisions of section 29 (2) have no application so as to exclude the provisions of section 5 of the Limitation Act from being applied to appeals under the special law. In this view we allow the civil revision petition and the civil miscellaneous second appeal and remit both the applications under section 5 and the appeal to the lower Court for disposal on the merits

The petitioner is entitled to his costs in this civil revision petition No separate costs in the appeal

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR JUSTICE SHAHABUDDIN.

Kallakuri Venkateswarlu and others *Appellants**

v.

Kalidindi Narayanaraju and others . *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), *section* 8 (1) *and* (2)—*Relief sought under section* 8 (1) —*Court if entitled to proceed to scale down under section* 8 (2)—*Payment " towards principal and interest "*—*If open payment available for reappropriation towards principal*

The provisions of section 8 of the Madras Agriculturists' Relief Act clearly give the debtor the option to claim relief either under sub-section (1) or sub-section (2) of that section Where the debtors claim relief under section 8 (1) the Court is not justified in proceeding under section 8 (2) instead of under section 8 (1) without giving reasons for it A payment " towards principal and interest " of a debt is to be treated as an open payment for the purpose of scaling down the debt under the Act and wiping out arrears of interest under section 8 (1)

Mahomed Akbar Khan v *Attar Singh*, A.I R 1945 P C 170, considered , *Veerraju* v *Rayanim Dora Garu*, (1940) 2 M L J 758, relied on.

Appeal against the decree of the Court of the Subordinate Judge, Narsapur, dated 14th December, 1943, in O. S. No. 20 of 1942.

V Govindarajachari and *V. Parthasarathi* for Appellants

P. Satyanarayana Rao and *P. Satyanarayana Raju* for Respondents

The Judgment of the Court was delivered by

Patanjali Sastri, J.—The short point raised in this appeal which has been brought by some of the defendants related to the mode of appropriating three of the payments made in scaling down the suit mortgage debt These payments are as follows : Rs 2,200 paid on 6th November, 1925 " towards the debt due under this mortgage deed " ; Rs 1,000 paid on 15th March, 1927, " towards the principal and interest due on the debt " and stated to have been " credited towards this deed "; Rs. 1,500 paid on 15th February, 1930, in two parts, namely, Rs 684-7-9 out of which Rs. 420 was to be credited to the principal and Rs. 264-7-9 towards the interest due on the bond, and Rs 815-8-3 paid " towards the deed." In scaling down the

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* Appeal No 357 of 1944. 22nd November, 1945.

debt the Court below after discussing the decisions of this Court relating to the manner in which open payments have to be dealt with for the purposes of the Act IV of 1938 expressed the opinion that a payment made towards principal and interest of a debt could not be regarded as an open payment It proceeded, however, to award relief to the debtors under section 8 (2) under which no question of appropriation of payments can arise at all Mr. Govindarajachari for the appellants complains that as his clients sought relief under section 8 (1) and not under section 8 (2) of the Act, the learned Judge should not have proceeded to scale down the debt under section 8 (2), and he further complains that the learned Judge was wrong in treating the payment of Rs 1,000 made towards principal and interest of the bond as not being an open payment. We are of opinion that these contentions are correct and must be accepted The learned Judge gives no reason why when the debtors claimed relief under section 8 (1) of the Act he scaled down the debt under section 8 (2). The provisions of section 8 clearly give the debtor the option to claim relief either under the one or the other of the two provisions referred to The Court below was therefore not justified in proceeding under section 8 (2) in the circumstances of the case

Proceeding, then, under section 8 (1) the question of appropriation of payments made prior to 1st October, 1937, has to be considered Reference was made by the learned Judge himself to the decision of this Court in *Veerraju* v *Rayanim Dora Garu*[1], where the following observations occur

> "On 4th October, 1924, a payment of Rs 3,367 was made and the endorsement is that it was made towards principal and interest of the debt, that is to say, there was apparently no specific appropriation towards either principal or interest . The payment made on 4th October, 1924, which has not been specifically appropriated will be disregarded in calculating the amount of interest outstanding on 1st October, 1937, unless it can be established that there has been a specific appropriation before 1st October, 1937"

In holding that the payment of Rs. 1,000 was not an open payment the learned judge distinguished the above decision on the ground that this Court did not use the expression "open payment" in its judgment, but the observations quite clearly imply that the payment made "towards principal and interest of the debt" in that case was to be treated as a payment not specifically appropriated towards either principal or interest, which means the same thing as an open payment. The decision is itself an authority for the proposition that a payment "towards principal and interest" of a debt is to be treated as open payment for purpose of scaling down the debt under the Act

Mr Satyanarayana Rao for the respondents attempted to show on the strength of a recent decision of their Lordships in *Mahomed Akbar Khan* v *Attar Singh*[2] that the series of decisions of this Court which have laid down that payments not specifically allocated to principal or interest before 1st October, 1937, should be treated as open payments in applying the process of scaling down debts under Madras Act IV of 1938 were all wrongly decided The case before their Lordships was one where certain payments made by the debtors had to be adjusted by ascertaining what part of the debt still carried interest after such adjustment, and the Court applied the usual rule that a payment should first go in reduction of the interest due on the debt and the balance alone should be applied in reduction of the principal. The same principle was laid down by their Lordships in *Venkatadri Apparao* v *Parthasarathi Appa Rao*[3], which indeed was referred to and followed by the Judicial Commissioner, North-Western Frontier Province in his judgment which was approved by their Lordships The line of cases was considered by their Lordships of the Privy Council in *Rama Shah* v *Lal Chand*[4], where they held that for the purposes of section 20 of the Limitation Act, however, an open payment cannot be turned into a part payment of principal by applying the rule that a payment should first be applied in reduction of the interest due, but that there should be an actual appro-

1 (1940) 2 M L J 758.
2. A.I R 1945 P.C 170
3 (1921) 40 M L J 549 L R 48 I A. 150 I.L R 44 Mad 570 (P C)
4 (1940) 1 M L J. 895 L R 67 I A. 160. I L R (1940) Lah. 470 (P C)

priation of such payment to principal to satisfy the requirements of the section. This Court followed that ruling and applied the same principle to the Madras Agriculturists' Relief Act which enacts that all interest outstanding on 1st October, 1937, in respect of certain classes of debts due by agriculturists should be deemed to be discharged We do not therefore think that the recent decision of their Lordships relied on by Mr Satyanarayana Rao affects the position any more than decisions like *Venkatadri Apparao* v *Parthasarathi Appa Rao*[1]. It is not disputed that if the first two payments and the second of the payments made on 15th February, 1930, are treated as open payments the amount properly payable to the plaintiffs will be Rs 1,564-7-9 as on 1st October, 1937 This sum will carry interest at 6¼ per cent per annum from that date till date of decree with further interest on the aggregate amount at the same rate till date of payment The appeal is allowed and the decree of the Court below will be modified accordingly The appellants will have proportionate costs in this Court. In the Court below the parties will pay and receive proportionate costs

K.S *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT .—MR JUSTICE KOMAN.

V Kunhikrishna Reddi .. *Petitioner**

v

Ramaraju .. *Respondent.*

Civil Procedure Code (V of 1908), sections 115, 151 and Order 9, rule 9—Dismissal of suit for default —Application for restoration—Vakalat being irregular—Dismissal of petition without issuing notice—Civil Revision Petition to High Court—Maintainability—Clerical error in vakalat if material

The suit was dismissed on 25th September, 1944, for default of appearance of the plaintiff The plaintiff through his vakil filed a petition under Order 9, rule 9 of the Code of Civil Procedure on 24th October, 1944, to have the suit restored to file But the vakalat on behalf of the plaintiff was defective as the body of the vakalat contained the name of another vakil, though the plaintiff's vakil had endorsed thereon his acceptance The Court returned the vakalat and the petition on 31st October, 1944, on the ground that the vakalat was defective and four days time was given for rectification. This was complied with and the petition and vakalat were re-presented on 4th November, 1944 The District Munsiff dismissed the petition without issuing notice to the defendant on the ground that the earlier presentation on 24th October, 1944, was not a proper presentation of the petition and that it had become barred by limitation by the time it was finally re-presented The plaintiff preferred a revision petition to the High Court

Held, that the revision petition was maintainable as the order sought to be revised was passed without notice being issued to the opposite party and so was not one passed under Order 9, rule 9 of the Code of Civil Procedure

Held further, that the earlier presentation on 24th October, 1944, was a proper filing within time and the fact that the vakil's name was not entered in the body of the vakalat was only a clerical error

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the Order of the Court of the District Munsiff of Trivellore dated 28th November, 1944, and made in un-numbered I A. of 1944 in O S No. 328 of 1943.

M Natesan for Petitioner.

V. Ganapathi Ayyar for Respondent

The Court delivered the following

JUDGMENT.—The petitioner is the plaintiff in O S No. 328 of 1943 on the file of the District Munsiff's Court, Trivellore. The suit was dismissed on the 25th September, 1944, for default of the appearance of the plaintiff. The plaintiff through his vakil Mr. M S. Parthasarathi Aiyangar filed a petition under Order 9,

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1 (1921) 40 M L J 549 L R 48 I A 150 I L R. 44 Mad 570 (P C)

*C. R. P No 704 of 1945 6th December, 1945

rule 9 of the Code of Civil Procedure on the 24th October, 1944, within time, to have the suit restored to file , but, in doing so, the vakalat on behalf of the vakil was defective In the body of the vakalat the name of Mr T E. Raghavachari was mentioned but his name was not struck off and Mr. Parthasarathi Aiyangar entered , but Mr Parthasarathi Aiyangar had endorsed on the vakalat accepting the same The Court returned the vakalat and the petition on the 31st October, 1944, as the vakalat was defective and four days time was given for rectification. This was complied with and the petition and the vakalat were re-presented to Court on the 4th November. The learned District Munsiff dismissed the petition on the ground that the earlier presentation on the 24th October, 1944, was not a proper presentation of the petition and that by the 4th of November, 1944, the petition was barred by limitation as under the Limitation Act a statutory right accrued to the respondent

A preliminary objection was taken to this petition that no petition lies to this Court as an appeal lies from an order under Order 9, rule 9 to the District Court. When a petition is filed under Order 9, rule 9, sub-section (2) of the rule provides that no order shall be made under the rule unless notice of the application has been served on the opposite party. Therefore the order now sought to be revised, which admittedly was passed without notice, cannot be considered to be one passed under Order 9, rule 9 If it is an order under Order 9, rule 9, it is to the District Court and not to the High Court, that an appeal lies Under section 115 of the Code of Civil Procedure the High Court can interfere in revision in all cases where no appeal lies directly to the High Court.

On the merits, I consider that the earlier presentation on the 24th October, is a proper filing within time, and the fact that the vakil's name was not entered in the body of the vakalat is only a clerical error, the intention of the parties being quite clear, as is also seen from the fact that the petition was returned to Mr. M. S. Parthasarathi Aiyangar for subsequent correction The view I have taken with regard to this point finds support in *Ram Sarup* v *Sahu Bhagwati Prasad*[1] and *Baldeo* v *Lachmi Narain*[2] I therefore allow the petition

The District Munsiff will have the petition restored to file and dispose of it on the merits according to law The petitioner is allowed the costs of this petition.

B V.V *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT .—MR JUSTICE BELL

T. Vijiaranga Naidu and another *Petitioners**

v.

D. Narayanappa . *Respondent*

Presidency Towns Insolvency Act (III of 1909), sections 17 and 45—Discharge of insolvent—Property vested in the Official Assignee does not automatically re-vest in the discharged insolvent

The defendant (mortgagor) was adjudicated an insolvent and pending the insolvency, the mortgagee brought a suit on the mortgage, obtained a decree and brought the property to sale But before the sale was confirmed, the insolvent obtained his discharge and sold that property to the plaintiff subject to the encumbrance and also gave him an indemnity The Official Assignee filed a petition for setting aside the sale on the ground that the property was still vested in him The plaintiff had to pay to the Official Assignee Rs 500 to be distributed among the insolvent's creditors, and thereupon he brought the suit against the defendant on the indemnity given in the sale deed.

Held, that on his discharge the property sold did not automatically re-vest in the insolvent and so he had no right to sell the same without the permission of the Official Assignee and accordingly the defendant was liable on his indemnity to pay the plaintiff the amount that had to be paid by him to the Official Assignee together with the expenses incurred

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Full Bench of the Small Cause Court, Madras,

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1 (1936) I L R 58 All 912 2 A I R 1934 All 810

* C R P No 620 of 1945 4th December, 1945.

dated 18th December, 1944, in N T. A. No 48 of 1944, against the order of the Court of Small Causes, Madras, dated 3rd February, 1944, in S. C S No. 2835 of 1943.

M N. Duraiswami Aiyangar for Petitioners

A Sahasranamam for Respondent

The Court delivered the following

JUDGMENT.—This civil revision petition is against an order of the Full Bench of the Madras Small Cause Court on a new trial application filed by the defendants (petitioners here) against the decision of the Chief Court decreeing a suit for Rs 650.

This money was claimed by the plaintiff by way of indemnity under a sale deed relating to a house purchased by him from the defendants The defendants were father and son and the father had in 1934 become an insolvent on his own petition He was duly adjudicated but obtained his discharge on 29th November, 1940

In 1938 the mortgagee of the property (later sold to the plaintiff) brought a suit on the mortgage and got a decree. The property was brought to sale on 16th January, 1940 and bought by the mortgagee It was not however confirmed and on 26th February, 1940, after his discharge, the first defendant and his son sold the property to the plaintiff. The plaintiff was willing to pay off the encumbrance and did in fact do so

The balance due under the purchase agreement, namely, about Rs. 900 was paid to the defendants

Then the Official Assignee came on the scene He filed a petition to set aside the sale because he said the property was still vested in him despite the discharge. The matter came before Chandrasekhara Aiyar, J, who held after investigating the facts that the purchaser of the property, the plaintiff in the subsequent suit, should pay a sum of Rs 500 to the Official Assignee to be distributed amongst the creditors.

The plaintiff thereupon brought a suit for Rs 650 made up of that Rs 500 and incidental cost and expenses, against the defendants They said in opposition that the Official Assignee had been a party to the mortgage proceedings in 1938 and from that date until after the sale of the property, had never put forward any claim to it or to any proceeds out of its sale. They said that he had in fact abandoned any claim and that in effect the property had re-vested in them and that they were entitled to sell and retain any balance

Before the Chief Court and before the Full Bench of the Small Cause Court the defendants relied on the decision reported in *Sheonandan* v *Kashi*[1], in support of their contention that after the discharge of an insolvent a sale held by him is good and passes whatever rights the insolvent had to the purchaser giving the latter a full and absolute title This decision however was dissented from by a Calcutta case reported in *Tarak Das Dhar* v *Santosh Kumar Mallik*[2]. In my view, with great respect the latter case is the more acceptable statement of the law At page 391 is set out the question which is the same in this case .

"Did the property in question, therefore, in some way or other either remain that of the insolvent or became re-vested in him in such manner that at the time when this suit was instituted he was in a position to say that the title to that property was in him?"

At page 393 the Court says

"It is very difficult to see how it can rightly be contended that once a particular item of property has vested in the Official Assignee by virtue of the operation of section 17 of the Presidency Towns Insolvency Act that property can become re-vested in the insolvent without any other action on the part of the Official Assignee save an expression of opinion that the property is of no value and that he does not propose to do anything in the way of attempting to make the property available for the creditors of the insolvent and that accordingly he is abandoning the property Mr Page, I think, realised the difficulty which confronted him in endeavouring to persuade us to accept the view that in law there can be such an abandonment of incorporeal or immoveable property by the Official Assignee as to bring it about that it becomes automatically or by some sort of metaphysical process, as it were, re-vested in the insolvent either during the currency of his insolvency or after his discharge"

1. (1916) I L R 39 All 223

2. I L.R (1937) 2 Cal. 386

They pointed out that this is obviously contrary to the express provisions of the Transfer of Property Act The Full Bench was therefore in my opinion right in basing their decision on the Calcutta case. It follows that the property did not re-vest in the insolvent and he had no right to sell it without the permission of the Official Assignee. In the sale deed he gave an indemnity to the plaintiff which is now being used against him

In the result this petition must be dismissed with costs.

V.P S *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE CHANDRASEKHARA AIYAR.

Palaniammal .. *Appellant**

v.

Arumugham Chetti .. *Respondent.*

Civil Procedure Code (V of 1908), section 11—Res judicata—*Execution of decree for maintenance against husband—Plea that decree had become unexecutable by resumption of co-habitation after the decree—Failure to set up plea in prior application for execution—Bar of constructive* res judicata.

Where in a prior application for execution of a decree for maintenance against the husband, the husband after notice did not come forward with any objections but resisted a subsequent application for execution by an objection that as co-habitation was resumed after the decree, the decree had become ineffective and was unexecutable,

Held, that the plea was barred by constructive *res judicata* It is an objection which might and ought to have been raised in the prior application for execution

Appeal against the order of the District Court, Salem, dated 17th March, 1945, in A S No 429 of 1944 (R E P. No 242 of 1944 in O S No 1075 of 1936, District Munsiff Court, Salem).

C S. Swaminathan for Appellant

C. Vasudevan for Respondent

The Court delivered the following

JUDGMENT —The wife, who was the petitioner in the trial Court and respondent in the District Court, has preferred this appeal against the order of remand in a matter relating to the execution of a decree for maintenance that she had obtained.

When she sought to execute the decree, she was met by an objection from the husband that, as they resumed co-habitation after the decree, the decree had become ineffective and that it was unexecutable The District Munsiff overruled the defendant's objection and allowed execution to proceed He held that the husband was barred by *res judicata* from setting up any contention to the effect that the decree had ceased to be effective and he based this finding on the fact that, in a prior execution petition filed by the wife, when notice went to the husband under Order 21, rule 22 of the Code of Civil Procedure, he did not come forward with any such objection and execution was proceeded with by attachment of certain properties in respect of which the defendant's son (illegitimate) came forward with a claim which was dismissed and which order was confirmed by the appellate Court on the ground that no appeal lay In the appellate order then made, the District Judge made an observation that the decree did not appear to be an executable one When the respondent took hold of this observation and pressed it into service against the wife, stating that it was *res judicata* against her, the District Munsiff as well as the District Judge on appeal held that it was not because it was only an *obiter dictum* which was not necessary for the disposal of the case which was determined on the ground that no appeal lay

The learned District Judge on appeal preferred by the husband against the District Munsiff's order has taken the view that, as it might be that the failure

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*A A. O No 325 of 1945 1st February, 1946

of the husband to raise the contention that he is now putting forward may have been due to one or more of several reasons, it was the duty of the District Munsiff to dispose of the matter after taking evidence with regard to the period of the co-habitation and the circumstances under which the respondent failed on the prior occasion to raise this question that the decree was not executable.

The view taken by the learned District Judge cannot be supported The resumption of co-habitation was before the prior execution petition was filed. It was therefore the obvious duty of the husband to have raised the objection to the execution of the decree on that occasion When he did not do so, for whatever reason it might be, the question must be deemed to have been considered and decided against him with the consequence that the principle of *res judicata* will apply Mr Vasudevan, the learned advocate for the respondent, urged that the doctrine of constructive *res judicata* will apply only to a case where the decree can be said to be in force and objection to its executability was not raised in execution proceedings and not to a case like this, where owing to subsequent resumption of co-habitation, the decree itself had ceased to be effective or operative as was held in *Venkayya* v *Raghavamma*[1]. This argument, however, amounts to making a distinction without a difference It is not a case of a void decree It was right when it was passed and all that the defendant could urge against it, if subsequent co-habitation had been resumed, is that it had ceased to be operative or effective. This question might and ought to have been raised by him then He did not do so and he cannot be permitted to agitate it now If, as the learned District Judge says, he thought the illegitimate son had taken up the question for fighting it out with the wife, it is only appropriate that he should be content with the result of the son's act or objection. It is difficult to see how this case is different from a case where the decree does not award a particular relief, and yet, after an execution petition is filed seeking that relief without any objection raised by the defendant, it has been held that he is barred by *res judicata* from contending that there is no decree for that relief If one can venture on surmises as to why the husband remained silent on the previous occasion and raised no objection, it may be that he thought that as a new situation had arisen after the resumption of co-habitation under which he would have had to pay maintenance, he did not think it worth his while to insist upon a separate suit being filed with the possibility, nay probability, of having to meet the costs of that litigation. But really there is no need for any such speculation The doctrine of *res judicata* which is a branch of the law of estoppel, clearly applies and prevents the husband from raising the contention that he has now put forward The order of the lower appellate Court is set aside and that of the District Munsiff restored with costs payable by the respondent to the appellant here and in the Court below

No leave.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

C. Atma Ram, Ex-Official Receiver, Rajahmundry *Appellant**

v.

Chogondi Sita Ramaswami and another *Respondents.*

Provincial Insolvency Act (V of 1920), sections 56 (4) and 65—Declaration of dividend—Payment by Official Receiver to wrong person—Claim by rightful creditor—Refusal of payment—Application under section 65—Receiver's conduct found to be grossly negligent—Maintainability of application and right to relief

In connection with an insolvency administration, the Official Receiver appointed by Court paid the dividend due to one of the creditors to a person who represented himself as properly authorised by the creditor in question to receive the payment on his behalf and who was also identified by two

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1 (1940) 2 M L J 263

* A A A O. No 120 of 1945 24th January, 1946.

witnesses requisitioned for the purpose But later on the rightful person, the respondent herein, appeared before the appellant, the Official Receiver, and asked for payment of the declared dividend as due to him Since the Official Receiver refused to pay on the ground of his having already paid the same to one, said to have been authorised on his behalf to receive the amount, the respondent came out with an application under section 65 of the Provincial Insolvency Act On the questions as to the maintainability of the application and as to whether the direction to pay to the respondent by the lower Court was a correct order,

Held, that even, however, if a suit by the respondent against the receiver would be maintainable, it did not follow that the respondent had necessarily to be referred to a suit as his remedy by the Court. In view of the provisions of section 56 (4) of the Provincial Insolvency Act and in view of the lower Court's finding that there was gross negligence in so far as the Official Receiver's conduct was concerned, it was clearly open to the Court to direct payment of the amount to the rightful creditor The fact that the application was made under section 65 without reference to section 56 (4) could not prejudice the appellant

Appeal against the order of the District Court of East Godavari at Rajamundry, dated 18th November, 1944, and made in C. M. A No 20 of 1943, preferred against the order of the Court of the Subordinate Judge of Amalapuram, dated 4th February, 1943, and made in I A No 67 of 1940 in I. P No 40 of 1932.

B V. Subrahmanyam for Appellant.

K Venkatarama Raju for Respondents

The Court delivered the following

JUDGMENT —The appellant in this C M. S A was the Official Receiver of East Godavari at Rajamundry. In connection with the administration of I P. No. 40 of 1932, a dividend was declared and a sum of Rs 589-2-8 was payable to the 12th creditor, the 1st respondent in this appeal, as his share According to the evidence no notice that the dividend had been sanctioned was sent to the 12th creditor or any of the creditors, as required by rule 19 of the rules framed under the Provincial Insolvency Act Nonetheless, after the dividend had been declared, a certain Bonam Ammiraju represented to the appellant that he was authorised by the respondent—12th creditor to receive payment of his dividend on his behalf, and produced a receipt and letter of authorisation purporting to have been signed by the first respondent and attestors The appellant, after having had Bonam Ammiraju identified by two witnesses, paid the dividend due to the first respondent over to him. Later, the first respondent himself appeared before the appellant and asked for payment and it transpired that a fraud had been played on both the appellant, the Official Receiver, and the first respondent—the 12th creditor As, however, the appellant refused to pay the first respondent on the ground that he had already in good faith paid the amount to Bonam Ammiraju, the first respondent made an application under section 65 of the Provincial Insolvency Act to the Subordinate Judge of Amalapuram asking for a direction to the appellant that the dividend, namely, the sum of Rs 589-2-8 should be paid to him The learned Subordinate Judge dismissed this application on the ground that sanction had not been obtained to the filing of the application as required by section 270 of the Government of India Act On appeal to him, the District Judge reversed the decision of the Subordinate Judge, allowed the application and directed the appellant to pay the dividend to the first respondent

It is conceded now that the view taken by the Subordinate Judge with regard to the application of section 270 of the Government of India Act was wrong It is argued, however, for the appellant that nonetheless the Court had no power in the circumstances of the case to direct payment of dividend to the first respondent under section 65 of the Act, or, in the alternative, that even if the Court had such power, the first respondent should have been referred to the remedy of a suit in preference to a summary disposal of the application under the provisions of section 65 There is no doubt some force in the contention for the appellant that the prohibition enacted by section 65 against a suit for a dividend against the receiver would not apply to a suit brought by the first respondent in the circumstances of the present case Such a suit, it is argued, would substantially be not a suit against the receiver for the recovery of the dividend but a suit for damages occasioned by

the negligence of the receiver in making payment to the wrong person Even, however, if a suit by the first respondent against the receiver would be maintainable, it does not follow that the first respondent had necessarily to be referred to a suit as his remedy by the Court, and, as the learned District Judge points out, in view of the provisions of section 56, sub-section (4) of the Provincial Insolvency Act, it cannot be contended with any force that the Court had no power to direct payment of the dividend. The lower appellate Court has found that the action of the appellant in making payment of the dividend to Bonam Ammiraju amounted to gross negligence and that finding cannot be canvassed in second appeal Section 56 (4) (*c*) provides that:

"Where a receiver appointed under this section occasions loss to the property by his wilful default or gross negligence, the Court may direct his property to be attached and sold, and may apply the proceeds to make good any balance found to be due from him or any loss so occasioned by him"

On the footing therefore of the finding that the appellant was guilty of gross negligence it was clearly open to the Court to direct payment of the amount wrongly paid to Bonam Ammiraju to the first respondent creditor The contention that the appellant has been prejudiced by the fact that the application was made under section 65 only without reference to section 56 (4) has, in my opinion, no force. The evidence given by the appellant in his chief examination and his cross-examination show that he was aware that the application turned on whether in paying Bonam Ammiraju the amount, he had acted with due care There is no suggestion that the appellant did not make the payment in good faith, but in face of the finding of fact by the lower appellate Court that there was gross negligence, there are no grounds for interfering with the direction that the dividend must now be paid to the first respondent

The appeal is consequently dismissed with costs [Leave to appeal is refused]

K.C. *Appeal dismissed*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Madras)

PRESENT —THE LORD CHANCELLOR (LORD JOWITT), LORD GODDARD AND SIR JOHN BEAUMONT

The Free Press of India (Madras), Ltd. *Appellant**

v

James Finlay & Co, Ltd. *Respondent*

Privy Council Appeal—Entertainability—Basis for assessment of damage agreed upon—Absence of any mistake in calculation on that basis—Agreed basis for assessment of damage cannot be attacked as wrong in appeal to the Privy Council

The advocate appearing for the appellant agreed before the High Court that the basis for the assessment of damage submitted by the counsel for the respondents was correct While the correctness of the amount awarded by the High Court on that basis was not disputed, it was sought to be contended on appeal before the Board that the basis on which the damages were assessed was wrong

Held, that their Lordships could not advise His Majesty to entertain the appeal as the Court from which the appeal was brought had acted as they were invited to act and in so doing made no mistake in the calculation

Judgment of the High Court affirmed.

C S Rewcastle, K C, J M. Pringle and *Ramsay* for Appellants.

Sir Thomas Strangman, K C and *W. W K Page* for Respondents

Their Lordships' Judgment was delivered by

LORD GODDARD —The appellants were the plaintiffs in an action brought by them in the High Court of Madras in its ordinary original civil jurisdiction for damages for breach of a contract dated 24th December, 1940, for the sale to them by the respondents of 200 long tons of Canadian newsprint shipment in one lot,

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* P C Appeal No. 47 of 1945 17th December, 1945

preferred in January, but in any case before the end of March 1941. They also claimed damages for the wrongful detention of certain licences for the import of newsprint granted to them by the Government of India The action was tried by Bell, J, who dismissed the action so far as it related to the breach of contract, holding that all the respondents had undertaken to do was to use their best endeavours to place the order with suppliers according to the appellants' wishes. On the claim for detention of the licences he found for the appellants and assessed the damages at Rs. 1,995-6-0. On appeal to the High Court of Madras in its appellate jurisdiction the appeal was allowed as regards the breach of contract and the respondents were held liable, the damages being assessed at Rs 18,440. The appellants also appealed as to the amount of damages awarded for the detention of licences and this appeal was dismissed The appellants now appeal solely on the amount of damages contending that they were awarded on a wrong basis and ought to be largely increased. There is no cross appeal by the respondents. Their Lordships find it unnecessary in this case to set out the facts relating to the sale or the breach of contract found by the High Court to have been committed, because on the hearing of the appeal it appears that the Advocate-General who appeared for the appellants agreed that the basis for the assessment of damage submitted by the counsel for the respondents was correct On that basis it is not disputed that the amount awarded by the High Court is right Before this Board it was sought to be contended that the basis on which the damages were assessed was wrong, but Their Lordships are clearly of opinion that they cannot advise His Majesty to entertain an appeal where the Court from which the appeal is brought acted as they were invited to do by both counsel and in so doing made no mistake in the calculation

With regard to the damages for the detention of the import licences, it appears that on 17th April, 1941, when the respondents were already in default, having shipped nothing, newsprint was included in the list of goods for which import licences were required and a notification to that effect was given by the Government. On 30th April, and 1st May, the appellants obtained two licences, one authorising them to import from Canada 146 tons 17 cwt for shipment during May/June, 1941, and another for the import of 36 tons 14 cwt during April, 1941 These licences they gave to the respondents in the hope that they would enable the latter to get other paper to take the place of that which they had failed to deliver But the respondents neither got other paper nor did they return the licences to the appellants when asked to do so and the consequence was that the licences expired Meanwhile the appellants were buying paper locally produced in India for which no licences were required and so managed to keep their works going In respect of these purchases they have recovered damages in the amount awarded by the High Court on appeal But to enable them to get further supplies they desired to get the licences extended, and this they would have had to do whether the respondents had returned the licences during their currency or not Both Courts in India have accordingly held that this damage is confined to the trouble and expense to which they were put by not having the licences in their hands at the time when they demanded their return, and to some demurrage which they had to pay on a steamer which arrived when the matter was in doubt The High Court agreed with the findings of fact by Bell, J, on this matter and on the facts found by him Their Lordships see no ground for interfering with the amount of damages that he awarded.

They will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for Appellant · *Barrow, Rogers and Nevill.*

Solicitors for Respondent · *Sanderson, Lee & Co.*

H.J.U /V.S *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE RAJAMANNAR.

Guduru Ramarayudu .. *Appellant**

v

Mallela Manikya Rao and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 11—Res judicata between co-defendants—Suit for partition and possession—Benami character of purchase found against—Subsequent suit by representatives of real owners against banamidar—Question of title whether can be gone into

The general rule is that a party to a suit cannot in a subsequent proceeding be heard to allege that a decree obtained against him in a former litigation was obtained as a result of collusion between himself and the plaintiff

In 1917, the appellant who was the first defendant in the suit, and one *S* purchased the undivided share in certain items of properties belonging to an insolvent from the Official Receiver. In 1922 one of the purchasers *S* filed a suit for a partition of the share of the insolvent and the allotment of the properties to the two purchasers The plaint alleged that the properties purchased in the name of the first defendant-appellant were purchased for the benefit of his father-in-law's family but it was also averred that the two purchasers had become owners of the entire share of the insolvent The members of the family of the first defendant's father-in-law were also made parties to the suit and in the course of his evidence the father-in-law stated that he did not advance the purchase money to his son-in-law, but no issue was framed in the suit regarding the alleged benami character of the purchase by the appellant The suit resulted in a finding that the plaintiff and the first defendant were entitled to have a separate allotment of the properties by reason of their purchases from the Official Receiver, and this decision was finally confirmed in appeal In the subsequent final decree proceedings the members of the family of the first defendant's father-in-law unsuccessfully attempted to establish their title to the properties as against the first defendant-appellant They then filed the later suit, out of which the present appeal arose, for a decree declaring that the first defendant-appellant was in the position of a benamidar or trustee for them and had no title otherwise than as trustee, and for an injunction restraining the first defendant from disturbing the plaintiff's possession, or alternatively for possession of those properties

Held, that even if the first defendant-appellant was a benamidar for the present plaintiffs, the latter were barred by the rule of *res judicata* from raising the contention as to their title to the properties, as their title was found against in the earlier final decree proceedings

Appeal against the decree of the Court of the Subordinate Judge of Guntur dated 21st December, 1943, and passed in O. S No 84 of 1942.

T. R. Venkatarama Sastri and *D. Munikanniah* for Appellant.

The Advocate-General (*K Rajah Aiyar*), *R. Rangachariar* and *P. Chandra Reddi* for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J—One Venkatrayudu who died in 1934, had a large family consisting of the plaintiffs 1, 2 and 3, the defendants 2 and 4, the deceased husband of the 3rd defendant and a daughter who was married to the 1st defendant, the appellant in the present case In 1915, one of the sons of Venkatrayudu, the 4th defendant, became an insolvent and in February, 1919, the Official Receiver in the insolvency sold his 1/7th share of the family properties partly to one Sivaramakrishnayya and partly to the appellant Sivaramakrishnayya purchased the 1/7th share in certain items and the appellant purchased the 1/7th share in other items. Together the two of them purchased the whole of the share of the insolvent son.

In 1922, one of the purchasers Sivaramakrishnayya filed a suit O S No. 55 of 1922, on the file of the Subordinate Judge of Guntur, in which he prayed for a partition of the share of the insolvent and the allotment of the properties to the two purchasers, namely, Sivaramakrishnayya and the present appellant, after working out the equities between the several parties, or alternatively the plaint prayed for allotment of the proportionate amount of the insolvent's share to the plaintiff, *i e*, Sivaramakrishnayya and his coparceners There was also a prayer for mesne profits. The plaint alleged that the properties purchased in the name of the 1st defendant were purchased for the benefit of his father-in-law's family, but it was also averred that the two purchasers, namely, Sivaramakrishnayya and the appellnt,

* Appeal Suit No, 175 of 1944 20th November, 1945.

had together become purchasers of the entire 1/7th share of the insolvent and that the appellant not having joined in instituting the suit as he was colluding with the other defendants had been made a defendant The appellant filed no written statement but it appears from the judgment that certain of the other defendants representing the family of the appellant's father-in-law did file written statements in which they made no averment regarding the nature of the title acquired by the appellant by reason of his purchase In the course of the evidence, however, Venkatrayudu, the father-in-law of the appellant, stated in evidence that he did not advance the purchase money to his son-in-law No issue was framed in the suit regarding the alleged benami character of the purchase by the appellant

The suit resulted in a finding that the plaintiff and the appellant were entitled to have a separate allotment of properties by reason of their purchases from the Official Receiver, that the properties so allotted were to be charged with a sum of Rs 1,000 being 1/7th of the amount set apart for the marriages of the daughters of the family, and the plaintiffs and the appellant were directed to pay respectively Rs 475 and Rs. 525 on this account. There were cross-appeals preferred against this decree, the plaintiff's appeal relating to the apportionment of costs between the plaintiff and the 1st defendant and the appeal of the members of the family of the defendant's father-in-law relating to various contentions with which we are not now concerned The appeal resulted in the confirmation of the trial Court's decree except for slight modifications There was a second appeal preferred by the members of the appellant's father-in-law's family which again resulted in substantial confirmation of the original decree

This litigation lasted up to June, 1934 Meanwhile, Sivaramakrishnayya had obtained a final decree, but nothing had been done by the present appellant in the direction of obtaining the final decree, to which the preliminary decree entitled him, and he does not seem to have contested any of the appellate proceedings In 1935, there was trouble in the family, one of the members of which obtained a decree on a promissory note against the present appellant Thereafter the appellant filed I A No 602 of 1937 in which he applied for a final decree for the possession of the properties to which he was entitled under the preliminary decree In the counter-affidavits in these proceedings it was for the first time specifically averred on behalf of the members of Venkatrayudu's family that the appellant had purchased the insolvent's property benami for the benefit of that family with funds supplied by the family and was therefore not entitled to a final decree This objection together with other contentions were considered by the learned Subordinate Judge in his order dated 25th August, 1942, on the application for a final decree. Paragraph 7 of that order summarised the contention that the appellant was a benamidar and therefore disentitled to a final decree for the possession of the lands held by the insolvent's family The learned Subordinate Judge meets this objection in the following words:

"This objection virtually attacks the decree itself by which the parties are bound It amounts to a denial of the right conferred upon the 1st defendant by the decree In the absence of authority I am unable to uphold the contention It was open to defendants 2 to 8 to plead in the suit that the 1st defendant was only a benamidar for them and as such was not entitled to any share I do not think I would be justified in enquiring into the benami nature of 1st defendant's purchase by receiving oral evidence, varying the decree"

The result was that a final decree was passed in favour of the appellant

No appeal was preferred against this final decree and the present suit was filed on the 5th December, 1942 In the present suit the prayer is for a decree declaring that the 1st defendant-appellant is in the position of a benamidar or trustee for the plaintiffs and other members of Venkatrayudu's family in respect of the suit sale deed and has no title to the properties otherwise than as a trustee, and for an injunction restraining the 1st defendant from disturbing the plaintiff's possession, or alternatively for possession of those properties The trial Court has held that the appellant was in fact a benamidar for the family of his father-in-law in respect of the properties purchased from the Official Receiver and that the present suit is

not barred by *res judicata* by reason of the decision in O S No 55 of 1922. Hence the present appeal

The 1st question which we have to decide is whether it has been established as a fact that the appellant was a benamidar for his father-in-law's family when he purchased the properties in February 1919

* * * * * *

[His Lordship considered the evidence and concluded as follows]

We therefore find that it has not been proved that the appellant purchased these properties as a benamidar for Venkatrayudu and his family

This finding is sufficient to dispose of the appeal, but as we have heard full arguments on the legal questions resulting from the lower Court's finding that the appellant was a benamidar, it seems to us desirable that we should state briefly our views We do not think that the case cited on behalf of the respondents on the question of *res judicata* between co-defendants and co-plaintiffs have any bearing on the point at issue, for the position of the appellant in the partition suit was really that of a plaintiff claiming partition against his father-in-law's family The learned Advocate-General cited the decision in *Kailas Mondal* v *Baroda Sundari Dasi*[1], as authority for the contention that when a benamidar has filed a suit against the real owner and the real owner has failed to contend that the plaintiff is a benamidar, such a contention may be raised in a subsequent suit , but we find on an examination of the facts in that case that the actual point at issue was something quite different. It is really a case in which the 1st suit was brought for rent and the tenant did not contend that the landlord must be non-suited because he is not the owner of the property but a mere benamidar, and he was allowed to raise such a contention in a subsequent suit on the footing that it was not clear that the evidence as to the status of the landlord was available to him in the former litigation It was not a case in which the tenant was alleging that the landlord was a benamidar for himself.

The general rule undoubtedly is that a party to a suit cannot in a subsequent proceeding be heard to allege that a decree obtained against him in a former litigation was obtained as a result of collusion between himself and the plaintiff. If authority is needed for this self evident proposition it can be found in *Kama Row* v. *Nukamma*[2], where a number of other cases are cited to the same effect. What in fact the respondents contend is that, although in the former suit the appellant was really in the position of a co-plaintiff, on whose behalf a decree was sought against them, they thought it desirable to maintain a pretence that he was entitled to a decree against them, although really the decree could not be operative having regard to the real state of title between the parties. It seems to us that such a plea cannot be entertained. If the respondents were in fact the real owners of this property and they suffered a decree to be passed against them which recognised the ownership of the appellant and his right to ask for a further decree for possession, they cannot afterwards be heard to say that the litigation so far as the appellant's claim was concerned, was a mere make-believe and that both parties had a private understanding that the decree should not operate.

This seems to have been the view of the learned Subordinate Judge who dealt with the objections in the final decree proceedings. No doubt it might have been possible to argue that the averment in the plaint that the appellant was a purchaser on behalf of Venkatrayudu's family might be read into the decree so as to treat that decree as authorising no more than the recognition of the appellant as a mere *benamidar*. We doubt whether such an argument could, if it had been advanced, have succeeded, but it does not appear to have been advanced and there is nothing in the judgment of the learned Judge who passed the final decree to indicate that he was merely leaving the matter open for some future proceedings in view of the fact that the preliminary decree was silent on the question of *benami*. It is,

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1. (1897) I.L R. 24 Cal. 711. 2 (1908) 18 M L J. 576 · I L R 31 Mad. 485.

moreover, doubtful whether even if the learned Judge had left the matter open that would have in any way affected the legal position

The position as it seems to us is this The plaint contained a somewhat superfluous averment that the 1st defendant was colluding with Venkatrayudu's family and that he purchased on their behalf There was no denial in the pleadings of this contention, but in the evidence Venkatrayudu asserted that he had not contributed the money towards the purchase. On the prayer in the plaint that a share should be allotted not merely to the then plaintiff but also to the appellant, a decree followed which recognised as against Venkatrayudu's family the right of the 1st defendant to recover possession by means of final decree proceedings of a certain share in the family properties and also recognised the obligation of the 1st defendant to contribute rateably to the amount necessary for the marriage of the unmarried daughters; that is to say, the preliminary decree treated the appellant precisely as if no question of benami had been referred to in the plaint at all and it treated him as a mere stranger purchaser entitled in equity to the allotment of a proportionate share out of the properties which should have been allotted to the insolvent whose share had been sold. That being so, as between the appellant who stood in the position of a plaintiff and Venkatrayudu's family who were the real defendants it was decided that the right to the ownership of the lands to be so allotted was with the appellant and not with the family. When the family of the defendants tried to raise in the final decree proceedings an objection, which if it had been successfully raised before the preliminary decree would presumably have resulted in the refusal of a preliminary decree to the appellant, the learned judge quite rightly refused to give effect to the objection, holding that to do so would be to nullify the preliminary decree so far as it related to the appellant Even if this decision in the final decree proceedings was wrong, it binds the parties thereto. We, therefore, are of opinion that even on the assumption, that the appellant was in fact a benamidar for Venkatrayudu and his family, the present suit must fail

In the result, therefore, we allow the appeal and dismiss the suit with costs throughout, the costs to be payable to the appellant, 1st defendant in the trial Court.

B V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE KUPPUSWAMI AYYAR.

Maruthy, Karnavan and Manager of the Tavazhi .. *Appellant**

v

Thayyil Pathumma (insane) by next friend Manakkadavan Pukkadan Ayissumma . *Respondeut*

Malabar Tenancy Act (XIV of 1930), section 33—Petition under—If maintainable by an insane person

It cannot be said to have been the intention of the framers of the Malabar Tenancy Act that no petition under section 33 of the Act could be filed by a minor, insane person, or person under a disability on the ground that they are not competent to contract The section is only a protection to the tenant, to the helpless man who is not able to find any residence Persons under disability are likely to be at a greater disadvantage than other men and they should not be denied the benefit of the Act Such a petition can be filed by a guardian of persons under disability There is no question of contract It is the order of the Court confirming the right in respect of a portion of a holding as separable *kudiyiruppu* that confers the right under section 33

Appeal against the order of the District Court of South Malabar dated 11th December, 1944, and made in A S No 222 of 1944, preferred against the order of the Court of the District Munsiff of Parappanangadi in I A No 1794 of 1942, in O S No 333 of 1942

K Kuttikrishna Menon for Appellant

S. R Subramania Aiyar for Respondent

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*A A A O No 145 of 1945 19th February, 1946

The Court delivered the following

JUDGMENT —The only three points for consideration in this appeal are (1) whether a petition under section 33 of Malabar Tenancy Act (Act XIV of 1930) is not maintainable at the instance of a person who cannot enter into a contract, being insane, (2) what is the correct value to be paid for the kudiyiruppu; and (3) whether the lower Court is wrong in having treated the kudiyiruppu as a separable kudiyiruppu and allotting the part so separated to the tenant.

In this case it is not a case of enforcement of a contract. No doubt the words "offer" and "acceptance" are used in the Act but that would not make the transaction a contract It is the order of Court confirming the right in respect of the portion of a holding as separable kudiyiruppu that confers the right It is true the petitioner was insane, but then she was represented by a guardian, and if a guardian could file a suit or contest a suit he could also file a petition under section 33 In these circumstances I do not think there is any force in the contention that the petition was not maintainable under section 33 because the petitioner was an insane person and therefore not entitled to enter into any contract If this contention were to be upheld, it would mean that no minor, no insane person or person under a disability can file a petition under section 33 which cannot be said to have been the intention of the framers of the Act It is only a protection to the tenant, to the helpless man who is not able to find any residence Persons under a disability are likely, to be at a greater disadvantage than other men, and I do not therefore think that the framers of the Act intended that such persons should be denied the benefits of the Act I therefore find this point against the appellant

The other two points are both points arising out of questions of fact. The lower Court has found that the kudiyiruppu was a separable kudiyiruppu, and it has directed only a portion of the land to be given to the tenant If the holding is not capable of being divided into two separate kudiyiruppus then it must be considered to be a case of separate kudiyiruppu and the tenant's request was that the whole holding should be given to her as a kudiyiruppu The order appealed against is an order in favour of the petitioner which has given only a portion of the holding as a separable kudiyiruppu There is therefore no force in the contention of the appellant either With regard to the value of the kudiyiruppu, that again is a question of fact It depends on the market value and the Court has fixed the market value with reference to the report of the Commissioner and with reference to the prior dealings with regard to the property

In the circumstances, the appeal has to be dismissed and is accordingly dismissed with costs

K S *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE KUPPUSWAMI AYYAR

P. Kuttiali and another *Petitioners.**

Madras Rationing Order (1943), clause 7—'Rationed articles'—Test—Purchase of 'rationed article' in a rationed area by a non-resident for use outside rationed area—Offence

The question whether an article is a "rationed article" or not is to be determined with reference to the nature of the article and not with reference to the area in which it is to be used or consumed. It follows that persons living outside the rationed area purchasing "rationed" article within a rationed area for use outside the rationed area are guilty of contravening clause 7 of the Madras Rationing Order

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Session, North Malabar division dated 3rd February, 1945, in C A No. 48 of 1944 (C C No 122 of 1944, Joint Magistrate Court, Tellicherry)

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*Crl R C No 455 of 1945
(Crl R P No. 418 of 1945) 8th February, 1946.

B. Pocker and *P A. Qadır Meeran* for Petıtıoners

The Publıc Prosecutor (*V L Ethıraj*) on behalf of the Crown

The Court made the followıng

ORDER.—The petıtıoners have been convıcted by the Joınt Magıstrate of Tellıcherry and sentenced to pay a fine of Rs 1,000 on each count ın respect of purchases made by them of paddy and rıce, ın contraventıon of clause 7 of the Madras Ratıonıng Order. Both the Courts have found that they dıd purchase and that they commıtted the offence.

What ıs urged before me ıs that the expressıon " ratıoned artıcle " must be understood wıth reference to the use to whıch the artıcle was to be put and not wıth reference to the place of the transactıon ın respect of the artıcles The persons who are saıd to have purchased the artıcles are persons lıvıng outsıde the ratıoned area, but the transactıon took place wıthın the ratıoned area The object of the order ıs to prevent the vıolatıon of the ratıonıng orders The scheme of the order clearly ındıcates that ıt was ıntended to prevent unrestrıcted purchases and sales ın the ratıoned area Therefore, purchases and sales ın the ratıoned area were ıntended to be covered This ıs a transactıon of sale and purchase made ın the ratıoned area The questıon whether the artıcle ıs a " ratıoned artıcle " or not ıs to be determıned wıth reference to the nature of the artıcle and not wıth reference to the area ın whıch ıt ıs to be used or consumed I do not therefore thınk that I wıll be justıfied ın acceptıng the contentıon of the petıtıoners that these are not " ratıoned artıcles " that were purchased They were " ratıoned artıcles " that were purchased and they were purchased ın a ratıoned area, and the petıtıoners were therefore rıghtly convıcted

The petıtıoner's plea was that they never commıtted the offence and they never purchased the artıcles Both the Courts have belıeved the evıdence of the cartmen and I do not thınk I wıll be justıfied ın ınterferıng wıth the apprecıatıon of the evıdence of two Courts.

Wıth regard to the sentence, the Magıstrate has stated that an exemplary punıshment has to be gıven because the quantıty of the artıcles purchased ındıcated that they were ıntended for use on the black market The petıtıoners are resıdents of Kallaı and ıt ıs not the prosecutıon case that they are tradıng ın a ratıoned area. Therefore, from the quantıty purchased, no ınference could be drawn that they ıntended to trade ın black market The reason gıven for exemplary punıshment therefore faıls I therefore reduce the sentence to a fine of Rs 100 ın respect of each count, takıng ınto consıderatıon the fact that these persons, beıng outsıde the ratıoned area, could have *bona fide* thought that they could make these purchases because the artıcles were ıntended for sale outsıde the ratıoned area and that no offence wıth regard to ratıonıng was lıkely to be commıtted by such purchases

V.S. ——— *Fıne reduced*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chıef Justıce* AND MR JUSTICE LAKSHMANA RAO

Srı Rajah Kotagırı Madhavarao Bahadur, Zamındar and others .. *Appellants**

v.

Vutukuru Papayya Rao .. *Respondent*

Cıvıl Procedure Code (V of 1908), sectıon 11—Decısıon ın rent suıt by Revenue Court wıthout jurısdıctıon and confirmed on appeal—If bar to plea of absence of jurısdıctıon ın subsequent rent suıt

In 1921 zamındar of Gampalagudem filed a suıt ın the Dıstrıct Munsıff's Court for a declaratıon that the Government had ıllegally enfranchısed the suıt lands and asked for an ınjunctıon restraınıng the Government from collectıng quıt rent from persons ın whose favour a patta had been granted by the Government Agaınst the tenants ımpleaded ın the suıt the plaıntıff asked for a decree

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* L. P. A No. 17 of 1945 29th November, 1945

for possession of the lands and mesne profits The plaintiff's case was that the lands were the subject-matter of a post-settlement service inam granted to the predecessors in title of the tenants The Government claimed that it was a pre-settlement inam and consequently there had been a lawful enfranchisement Two of the tenants *X* and *Y* supported the Government On 22nd December, 1922, the District Munsiff granted a decree as prayed The Government as well as the tenants appealed and the Subordinate Judge confirmed the decree so far as it affected the Government and found that the lands were held under a post-settlement inam and declared that the tenants were liable to rent but he varied the Munsiff's direction for delivery of possession as he considered that the inam covered merely the melwaram right The direction for payment of mesne profits was vacated The Government appealed and the plaintiff and the tenants were made respondents By judgment dated 18th December, 1931, the High Court held that the Subordinate Judge had erred in treating the inams as post-settlement inams, which meant that the title to the lands was vested in the Government but inconsistently directed that the decree as against the inamdars should stand After this decision *X* and *Y* refused to pay rent to the zamindar and paid quit-rent to Government *M*, the successors to the zamindari, instituted in 1934 a rent suit in the Revenue Court against *X* for rent due in respect o fasli 1341, 1342 and 1343 *X's* objections were overruled and the suit was decreed and the same was confirmed on appeal In 1937, *M* again sued in the Revenue Court for rent claimed to be due for the years 1934-35, 1935-36 and 1936-37 *X* did not defend the suit and a decree was passed *ex parte* On the 14th August, 1941, *M* filed again a rent suit against *X* in the Revenue Court in respect of rent due for the years 1937-38, 1938-39 and 1939-40 *X* pleaded that the Revenue Court had no jurisdiction as the land did not form part of an estate and that he was holding the land under a patta from Government

Held, (i) as it had been finally decided in the second appeal that the title to the lands was in the Government no suit for rent would lie in a Revenue Court

(ii) As the Revenue Court had no jurisdiction to entertain those suits the earlier decrees passed therein must be treated as nullities and cannot operate as *res judicata* An appellate decree confirming a decree passed without jurisdiction can have no more validity than the decree of the first Court. Nor does the fact that such a decree was *ex parte* make any difference

But the ryots who had not appealed but accepted tenancies from the zamindar will be bound to fulfil their obligation as tenants but the tenancies cannot be treated as tenancies within the meaning of the Madras Estates Land Act and a rent suit in respect of such tenancies cannot be filed in a Revenue Court

Appeal under clause 15 of the Letters Patent against the judgment of Chandrasekhara Aiyar, J., dated 16th February, 1945, in S A No 495 of 1944, preferred to the High Court against the decree of the District Court, Kistna, in A S No 75 of 1943, preferred against the decree of the Court of the Deputy Collector, Bezwada division, in S S No 391 of 1941.

P. Somasundaram for Appellants

P Satyanarayana Rao for Respondent.

The Judgment of the Court was delivered by

The Chief Justice —This appeal raises a difficult question of law In order to understand the position we have to go back to the year 1921 In that year the zamindar of Gampalagudem filed a suit, O S No 352 of 1921, in the Court of the District Munsiff of Bezwada for a declaration that the Government had illegally enfranchised the lands referred to in the plaint They asked for an injunction restraining the Government, the first defendant, from collecting quit rent from the second and third defendants in whose favour a patta had been granted by the Government. Against the tenants the plaintiff asked for a decree for possession of the lands and mesne profits The plaintiff's case was that the lands were the subject-matter of a post-settlement service inam granted to the predecessor-in-title of the second and third defendants The Government defended the suit on the ground that the inam was in fact a pre-settlement inam and consequently there had been a lawful enfranchisement The second and third defendants supported the Government in this contention On the 22nd December, 1922, the District Munsiff granted a decree as prayed The Government filed an appeal to the Court of the Subordinate Judge, as also did the tenants By a judgment dated the 26th February, 1926, the Subordinate Judge confirmed the decree of the District Munsiff so far as it affected the Government. So far as the tenants were concerned he accepted the District Munsiff's declaration that they were liable to pay rent to the zamindars in respect of the lands held by them, in other words, he found that they were held under a post-settlement inam, but he varied the District Munsiff's

direction for delivery of possession as he considered that the inam covered merely the melwaram right The direction for payment of mesne profits was vacated. The Government appealed to this Court in Second Appeal No 280 of 1927 The plaintiffs and the tenant-defendants were made respondents to the appeal It was heard by Ramesam and Madhavan Nair, JJ, along with 189 other second appeals, in which the same questions were involved By judgments dated the 18th December, 1931, covering all the appeals the learned Judges held that the Subordinate Judge had erred in treating the inams as post-settlement inams They found as a fact that they were all pre-settlement inams which meant that the title to the lands was vested in the Government This decision was binding on the Government and on the respondents to the appeals The learned Judges, however, inconsistently directed that the decrees passed by the Subordinate Judge against the inamdars should stand

During the hearing of the 190 appeals certain tenants who had not appealed from the decrees passed against them by the District Munsiff and were not parties to the second appeals filed by the Government, applied to the Court to be made parties Their applications were dismissed In the part of his judgment which dealt with these applications, Ramesam, J, acknowledged that on the findings arrived by the Court, strictly speaking the zamindar's suits should be dismissed, not only against the Government, but also against the inamdars It was suspected that some of them had been colluding with the zamindars against the Government. In the circumstances the Court was not prepared to interfere with the decrees of the Subordinate Judge to the extent to which they affected the tenants The learned Judge added that the only result of the Court's conclusions in the second appeals was that the zamindar's suits against Government were dismissed, "but they get a decree for possession against the village servants and if they submit to it it is their own fault" The words "if they submit to it" presumably relate to the inamdars who had not appealed against the decrees of the District Munsiff

As a result of the finding of Ramesam and Madhavan Nair, JJ, that the title to the land was vested with the Government and not in the zamindar the second and third defendants in O S No 352 of 1921 refused to pay rent to the zamindar and paid quit rent, to Government On the 21st September, 1934, the present plaintiffs, the successors to the zamindari, instituted a rent suit in the Revenue Court against the second defendant for rent claimed to be due in respect of faslis 1341, 1342 and 1343 corresponding to the years 1931-32, 1932-33 and 1933-34. The second defendant raised the objections which were raised by him in O S No 352 of 1921, but they were overruled and the suit was decreed He appealed to the District Judge under section 192 of the Madras Estates Land Act, read with section 96 of the Code of Civil Procedure The appeal was dismissed and no second appeal was filed On the 16th March, 1937, the plaintiffs filed in the Revenue Court Summary Suit No 90 of 1937 to recover from the second defendant the rent claimed to be due for the years 1934-35, 1935-36 and 1936-37 He did not defend the suit and a decree was passed *ex parte* On the 14th August, 1941, the plaintiffs filed the suit which has given rise to the appeal. It was filed in the Revenue Court in respect of the rent due for the years 1937-38, 1938-39 and 1939-40. Here again the only defendant was the second defendant in O S No 352 of 1921. The defendant pleaded that the Revenue Court had no jurisdiction as the land did not form part of an estate and that he was holding the land under a patta from Government. The Deputy Collector decreed the suit, but on appeal to the District Court his decision was reversed and the suit was dismissed The plaintiffs appealed to this Court The appeal was heard by Chandrasekhara Aiyar, J, who agreed with the District Judge The present appeal is from the judgment of the learned Judge under clause 15 of the Letters Patent.

Mr. Justice Chandrasekhara Aiyar held that the decision of this Court in S.A No 280 of 1927 conclusively decided the question with regard to the ownership of the land and that the decision of Ramesam and Madhavan Nair, JJ, to leave the decree of the Subordinate Judge untouched as far as the tenants were concerned

did not operate as *res judicata* on the question of their liability to pay rent to the zamindars While accepting that the judgments of Ramesam and Madhavan Nair, JJ, fully settled the controversy as to whether the lands were to be regarded as ryoti or ryotwari lands the plaintiffs say that inasmuch as the learned Judge did not set aside the declaration of the Subordinate Judge with regard to the liability of the tenants to pay rent to the zamindar to this extent the decree operated as *res judicata* in their favour.

This question has come before this Court on three previous occasions, once before Venkataramana Rao, J and twice before King, J The judgments delivered by them are in conflict. The judgment of Venkataramana Rao, J, was delivered in S.A. Nos. 791 and 792 of 1934 on the 9th November, 1938 He was of the opinion that it was not really a question whether the doctrine of *res judicata* applied, but whether the zamindars were entitled to maintain suits for rent as it had been definitely decided that they had no title to the land, the title being entirely in the Government. He was of the opinion that there was nothing in law to preclude a tenant from pleading that the zamindars were no longer his landholders and that he was not bound to pay rent to him

The question came before King, J, in S A Nos. 1094 and 1095 of 1940 and Nos. 888 and 914 of 1938. His judgment is dated the 25th June, 1942 He considered that the judgment of Ramesam and Madhavan Nair, JJ, operated as *res judicata* as against those tenants to whom relief has not been granted under Order XLI rule 33 of the Code of Civil Procedure, that is against those who had not appealed against the decree of the District Munsiff and were not parties to the second appeals The question again came before the learned Judge in Civil Revision Petitions Nos. 2410 and 2411 of 1940 where he expressed the same opinion

In his judgment now under appeal Chandrasekhara Aiyar, J, agreed with Venkataramana Rao, J

As it was decided that the title to land was in Government and not in the zamindar, with great respect, we consider that it is very unfortunate that the suits which the zamindars filed in 1921 were not dismissed in their entirety. As Ramesam, J., admitted that this course was the logical conclusion of the Court's decision with regard to title, it is difficult to understand why the suits were not dismissed The fact that the learned Judges suspected that there was collusion between some of the tenants and the zamindars does not appear to us to have any bearing. The failure to dismiss the suits has led to a very difficult situation and has given rise, and will continue to give rise, to further litigation The decision cannot, however, be ignored and we must decide whether by reason of it the present holders of the estate are entitled to bring a rent suit against the defendant on the basis that he holds the lands under a *darmilla inam*

We consider that Venkataramana Rao, J, came to the correct conclusion. As it had been finally decided that the title to the lands was in the Government no suit for rent would lie in a Revenue Court The plaintiffs could only have sued for rent if the title was in them and it was not A person holding a patta from Government is entitled to say to the plaintiffs " I am not your tenant and therefore you have no right to sue me for rent "

It is said on behalf of the plaintiff that the decrees passed in the previous rent suits against the defendant in themselves operate as *res judicata*. This contention is manifestly fallacious As the Revenue Court had no jurisdiction to entertain those suits the decrees passed therein must be treated as nullities and the same remark applies to the decree of the District Judge in the appeal from the decree of the Revenue Court in S S No 223 of 1934 An appellate decree confirming a decree which is passed without jurisdiction can have no more validity than the decree of the first Court The fact that the decree in S S No 90 of 1937 was passed *ex parte* also makes no difference

It follows that we agree with the decision of Chandrasekhara Aiyar, J and the appeal must be dismissed with costs.

We wish to make it clear that our judgment is only intended to apply to the case of a tenant who appealed to the Subordinate Judge from the District Munsiff's decree and was a party to the subsequent second appeal, which is the case here Where the zamindars obtained possession under the decree passed by the District Munsiff or the tenant in consequence of the decree surrendered possession to him the position is quite different In the course of the arguments the Court was told that in such cases the zamindars have been recognised by the Government as the pattadars The ryots who have accepted tenancies from the zamindars will be bound to fulfil their obligations as tenants, but, of course, the zamindars will not be entitled to treat the tenancies as being tenancies within the meaning of the Madras Estates Land Act and therefore will not be able to sue them for arrears of rent in a Revenue Court. The Civil Court alone will have jurisdiction

K S — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO

Vajapeyajula Venkateswarlu and another .. *Appellants**

v

Ragadamilli Viraswami and others .. *Respondents*

Madras Estates Land Act (I of 1908), *sections* 8, 112, 116 *and* 149—*Joint landholders—Sale of holdin by one of them for arrears of rent—Relinquishment of tenancy in the meanwhile—Subsequent tenant let in possessio by other landholders before the sale—Validity of sale—Suit by the subsequent tenant for setting aside sale—Limitatio —Article* 12 (b) *of the Limitation Act (IX of* 1908) *does not apply*

The second defendant and defendants 3 to 8 jointly held as landholders certain lanka lands with an agreement that the 2nd defendant should have the right of management in faslis ending with an even number and that defendants 3 to 8 should have the same right in faslis ending with an odd number In fasli 1344, the tenant, the 1st plaintiff, failed to pay the rent due for that year The second defendant, the then manager for the year started proceedings under section 112 of the Madras Estates Land Act On the last day of the fasli 1346 the 1st plaintiff relinquished his tenancy, complying with all the requirements of section 149 Eventually there was a sale and the 2nd defendant purchased the kudiwaram interest in the property But prior to the sale the 3rd defendant who had then the right to manage the property, let the father of the 2nd plaintiff into possession In spite of the objections of the 2nd plaintiff's father the 2nd defendant was put in possession On a suit by the 2nd plaintiff on whom his father's rights devolved asking for a decree declaring that he was entitled to the kudiwaram right in the lands, for possession and for mesne profits,

Held, that (i) by reason of the relinquishment of the tenancy by the then tenant, the 1st plaintiff his kudiwaram right vested in the 2nd defendant and defendants 3 to 8 and there was a merger within the meaning of section 8 and as such the sale of the holding by the 2nd defendant for arrears of rent was invalid and could not affect the rights of the 2nd plaintiff

(ii) Article 12 (*b*) of the Limitation Act was not applicable to a case in which dispossession was the cause of action and in which the plaintiff was not a party to or bound by the sale, and the suit was filed within four years of the dispossession was well within time

Kadar Hussain v *Hussain Sahib*, (1896) 7 M L J 52 I L R 20 Mad 118 (F B), *Jwala Sahai* v *Masiat Khan*, (1904) I L R 26 All 346, *Kedar Nath Goenka* v *Ram Narain Lal*, (1935) L R 62 I A 224 I L R 14 Pat 611 (P C), followed

Appeal against the decree of the Court of the Subordinate Judge of Ellore in O.S No 69 of 1943

Sir Alladi Krishnaswami Aiyar and *B V Subrahmanyam* for Appellants.

M Krishna Rao and *M S Ramachandra Rao* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice —The facts in this case are complicated, but they are not in dispute The contest is with regard to their effect in law

At all times material to the suit out of which the appeal arises the second defendant and defendants 3 to 8 jointly held as landholders within the meaning of the Madras Estates Land Act certain *lanka* lands measuring 217 32 acres It was agreed between these defendants that the second defendant should have the right

* Appeal No 521 of 1944 17th January, 1946

of managing the lands in faslis ending with an even number and that defendants 3 to 8 should have the same right in faslis ending in an odd number In fasli 1344 (1st July, 1934 to 30th June, 1935) the first plaintiff was the tenant of the lands and it being an even fasli the second defendant was lawfully in charge of them The first plaintiff failed to pay the rent due for that year and on the 2nd June, 1936, the second defendant started proceedings under section 112 of the Madras Estates Land Act, which he had then the right to do The amount due by the first plaintiff in respect of rent was Rs 993-12-0. On the 30th June, 1937, that is the last day of fasli 1346 the first plaintiff gave notice under section 149 to all the co-landholders of his resolve to relinquish his tenancy The notice served upon the second defendant was admittedly received by him on the 2nd July, 1937 Within thirty days of the receipt of the notice served upon him under section 112, the first plaintiff instituted a suit under sub-section (2) contesting the right of the second defendant to proceed with the sale. This suit was dismissed on the 19th April, 1937

The third and fourth defendants had received notice under section 112 of the second defendant's intention to sell and they also filed a suit under sub-section (2). They maintained that they had been unjustly included in the notice and that the rent due to the second defendant could be recovered by proceeding against the holding and the defaulting ryot. As the result of their protest they were exonerated from the proceedings which were continued merely against the first plaintiff as the ryot concerned On the 3rd June, 1937, the Deputy Collector passed an order for sale under section 116 On the 10th August, 1937, the first plaintiff filed a memorandum saying that he had relinquished his interest in the holding under section 149 and therefore he was no longer interested in the proceedings On the 18th August, 1937, the Deputy Collector passed this order .

"The petition for relinquishment is time-barred under section 149 of the Estates Land Act. File with S A. No 2 of 1346"

S A No. 2 of 1346 was the application filed by the second defendant under section 114 after the first plaintiff's suit under section 112 (2) had been dismissed. The order is difficult to understand as there was no question of limitation Learned counsel have not been able to throw any light upon the matter

On the 20th August, 1937, the third defendant, on behalf of himself and defendants 4 to 8, filed an application purporting to be made under Order XXI, rule 58, and section 151 of the Code of Civil Procedure asking that the sale be stopped and all proceedings dropped The basis of this application was that as the result of the first plaintiff's relinquishment of his tenancy there had been a merger within the meaning of section 8 (1) Pending the hearing of the application the sale was stayed In these proceedings the first plaintiff filed a counter-affidavit saying that he had unnecessarily been made a party because he had surrendered his tenancy. By an order dated the 5th October, 1937, the Deputy Collector dismissed the third defendant's application and cancelled the stay order. By an order dated the 29th October, 1937, he ordered the selling officer to sell the holding before the 24th December, 1937 On the 1st November, 1937, the selling officer fixed the sale for the 23rd December, 1937.

On the 13th November, 1937, the third defendant filed an application asking the Collector to revise the Deputy Collector's Order of the 5th October, 1937. The Collector dismissed this application on the 16th December, 1937, and discharged an interim stay order which he had passed. On the 27th December, 1937, the Collector's order was communicated to the selling officer, who thereupon fixed the sale for the 18th January, 1938. On the 15th January, 1938, the first plaintiff asked the Deputy Collector to stay the sale on the ground that the proceedings were invalid because there was no *pattadar*. This was dismissed by an order passed the next day

On the 14th December, 1937, that is, two days before the Collector dismissed his revision petition, the third defendant let Ramineedi Ranga Rao, the father of the second plaintiff, into possession. This was during fasli 1347 when defendants 3

to 8 were in management of the property. The fact that Ranga Rao had been let into possession was not known to the second defendant until the 22nd February, 1938.

The sale was held on the 18th January, 1938 and the second defendant purchased the *kudiwaram* interest in the property. On the 22nd February, 1938, Ranga Rao applied to the Deputy Collector for an order setting saide the sale on the ground of irregularities in its conduct, but the petition was dismissed by an order passed on the 30th June, 1938. On the 31st October, 1938, the Collector put the second defendant in possession whereupon the second defendant granted a tenancy of the lands to the first defendant.

The present suit was not filed until the 6th April, 1942. In the meantime Ranga Rao had died and his interest had devolved upon his son the second plaintiff. The two plaintiffs asked for a decree declaring that they were entitled to the *kudiwaram* right in the lands, for possession and for mesne profits The Subordinate Judge dismissed the suit as regards the first plaintiff but granted the second plaintiff a decree declaring him to be entitled to the *kudiwaram* right and to possession of the property His reasons for doing so were (1) The sale of the holding was invalid by reason of the relinquishment of the tenancy by the first plaintiff, and (2) there had been material irregularities in the conduct of the sale The Subordinate Judge rejected a plea advanced by the first and second defendants that the suit was barred by the law of limitation The first and second defendants have appealed

By virtue of section 149 every ryot has the right of relinquishing his holding or any part of it with effect from the end of a revenue year. The relinquishment must be by a notice in writing signed by him. His right to relinquish is absolute, subject to his compliance with the formalities required by the section and the right of the landholder to institute a suit before the Collector for indemnity against loss of rent, for the revenue year next following the date of the relinquishment, unless the tenant had given notice of his intention to relinquish before the 1st April. Section 187 (1) (*f*) expressly states that the right of relinquishment cannot be taken away by a contract between the landholder and the ryot Therefore the first plaintiff undoubtedly acted within his rights when on the 30th June, 1937, the last day of the revenue year, he gave notice of relinquishment to the proprietors of the land. Admittedly the notice complied with all the requirments of section 149. That being the position, the second defendant had no right to apply for the sale of the holding. The *kudiwaram* right of the first plaintiff had vested in the second defendant and defendants 3 to 8 In other words, there was a merger within the meaning of section 8 By reason of the relinquishment the second defendant could, of course, not be deprived of his right to recover the rent for fasli 1344, but his remedy was by way of suit under section 77, and not otherwise. As the *kudiwaram* right had vested in the landholders, there could be no charge in favour of them or any of them. In these circumstances the sale was invalid and therefore could not affect the rights of the second plaintiff who at no stage was made a party to the proceedings instituted by the second defendant for the sale of the *kudiwaram* right

In view of this finding it is not necessary for us to consider whether the Subordinate Judge was right in holding that the sale was also vitiated by irregularities in its conduct It is, however, necessary to deal with the question of limitation. The argument for the appellants here is that the suit is governed by article 12 (*b*) of the Limitation Act, which provides *inter alia* that a suit to set aside a sale in pursuance of a decree or order of a Collector or other officer of revenue shall be brought within one year from the date when the sale is confirmed or would otherwise have become final and conclusive had no suit been brought. Sir Alladi Krishnaswami Ayyar, on behalf of the appellants had relied on the judgment in *Kamaluammal* v. *Chokkalingam Asari*[1] It was there held by Phillips and Venkatasubba Rao, JJ., that a suit to set aside a revenue sale after one year after the expiration of thirty days from the date of sale was barred under article 12 (*b*) of the Limitation Act.

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1 (1923) 45 M.L J 840.

In *Subbayya* v. *Kristayya*[1], Devadoss, J., in *Kootoorlingam Pillai* v *Sennappa Reddiar*[2], Ramesam, J , and in *Satyanarayana* v. *Rayalamma*[3], Abdur Rahman, J , said in effect that a sale held in accordance with the procedure prescribed in sections 111 to 131 does not fall within article 12 (*b*) because it is not held in pursuance of an order of the Collector, whose function was merely to direct the selling officer to conduct the sales Devadoss, J , did not consider *Kamaluammal* v. *Chokkalingam Asari*[4], but Ramesam, J., did. Abdur Rahman, J , considered that *Kamaluammal* v *Chokkalingam Asari*[4] had been distinguished by Ramesam, J. in *Kootoorlingam Pillai* v. *Sennappa Reddiar*[2] This statement is erroneous Ramesam, J made no attempt to distinguish *Kamaluammal* v. *Chokkalingam Asari*[4] from the case before him Although it was quite unnecessary for him to do so for the purpose of deciding the case before him Ramesam, J , intimated that he was not prepared to accept the judgment in *Kamaluammal* v *Chokkalingam Asari*[4]

We are not called upon to discuss the conflict because we are of the opinion that article 12 (*b*) cannot be applied in this case for the reasons given in *Kadar Hussain* v. *Hussain Saheb*[5], *Jwala Sahai* v. *Masiat Khan*[6], and *Kedar Nath Goenka* v *Ram Narain Lal*[7] If we had been of the opinion that the suit fell within article 12 (*b*) we should have followed *Kamaluammal* v *Chokkalingam Asari*[4], as being binding on us even if section 116 of the Madras Estates Land Act had remained unamended. The section was amended in 1934, and the amendment has negatived the opinion expressed by Devadoss, Ramesam and Abdur Rahman, JJ , because section 116 now expressly directs the Collector to order the sale.

In *Kadar Hussain* v *Hussain Saheb*[5], a Full Bench of this Court held that article 12 (*b*) was not applicable to a case in which dispossession was the cause of action and in which the plaintiff was not a party to, or bound by the sale The same view was expressed by the Allahabad High Court in *Jwala Sahai* v. *Masiat Khan*[6] In that case immoveable property was sold as the property of persons to whom it did not belong and the person to whom it did belong had no notice of the sale It was held that the true owner was competent to treat the sale as a nullity and to bring his suit for recovery of possession at any time within twelve years from the date when he lost possession This decision received express approval from the Privy Council in *Kedar Nath Goenka* v *Ram Narain Lal*[7].

The present suit was not one for setting aside the sale The suit was for the recovery of possession of property from the first defendant on the ground that the second plaintiff had been wrongly dispossessed As we have already pointed out, he was let into possession by defendants 3 to 8 when they were in lawful management of the property He was dispossessed on the 31st October, 1938, when the second defendant was given possession by the Revenue authorities by reason of his purchase at the sale held on the 18th January, 1938 The sale was illegal and therefore the second plaintiff was wrongly dispossessed As the suit was filed within four years of the dispossession it was well within time

The appeal is dismissed with costs in favour of the second plaintiff (the second respondent)

The plaintiffs have each filed a memorandum of cross-objections These are not pressed and are dismissed with costs in favour of the appellants

V P S *Appeal dismissed.*

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1 (1926) 52 M L J 390 (F B)
2. (1931) 61 M L J 203
3. (1943) 1 M L J 386
4 (1923) 45 M L J 840
5. (1896) 7 M L J 52 I L R 20 Mad 118.
6 (1904) I L R 26 All 346
7 (1935) L R 62 I A 224 I L R 14 Pat 611 (P C)

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore)

PRESENT :—LORD THANKERTON, LORD GODDARD AND SIR JOHN BEAUMONT.

Ram Rattan . *Appellant**

v.

Parma Nand . *Respondent.*

Stamp Act (II of 1899), *section* 35—*Partition lists—Not stamped—Admissibility to corroborate oral evidence as to* factum *of partition—Meaning of the words "for any purpose" in section* 35

In a suit by one Hindu brother against another for partition it was pleaded in defence that there had already been a partition and two unstamped memoranda showing the details as to the division arrived at was relied upon to corroborate the oral evidence as to prior partition On a question as to whether the said memoranda could be used to corroborate the oral evidence for the purpose of determining the *factum* of partition as distinct from its terms,

Held, that they should be excluded from consideration A document admitted in proof of some collateral matter is admitted in evidence for that purpose, and section 35 of the Stamp Act enacts that it shall not be admitted in evidence "for any purpose" There is no reason why the words "for any purpose" in section 35 of the Act should not be given their natural meaning and effect Such words may well have been inserted by the Legislature in order to get rid of the difficulties surrounding the question of what amounted to a collateral purpose

Robert Ritson for Appellant

C S Rewcastle, K C and *J. M Parikh* for Respondent

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT —This is an appeal from the judgment and decree of the High Court of Judicature at Lahore, dated the 15th July, 1942, which allowed in part an appeal from, and modified the judgment and decree of the Senior Subordinate Judge of Gurdaspur, dated 3rd March, 1941.

It is common ground that prior to 1934 the appellant and respondent, who are full brothers, their father Bhodu Shah, and their step-brother Wadhawa Mal had formed a joint Hindu family, and that in 1932 Wadhawa Mal instituted a suit for partition On 27th December, 1934, Bhodu Shah having died during the pendency of the suit, Wadhawa Mal on the one hand and the appellant and respondent on the other hand entered into a compromise whereby one-third of the family property was assigned to Wadhawa Mal and two-thirds to the appellant and respondent.

The suit in which this appeal arises was instituted by the appellant on 21st December, 1939. In his plaint he alleged that after the partition of 1934 he and the respondent remained members of a joint Hindu family, the respondent as the elder brother being the *karta* The appellant claimed partition of the joint family property, possession of his share, and the rendering of accounts by the respondent. The respondent in his written statement alleged that partition was effected in 1934 between all the members of the family and that thereafter he and the appellant were divided in status, but remained joint owners of their share of the family property until 21st February, 1939, that on that date the bulk of the property was physically divided between the two brothers, though part still remained in joint ownership, and that two memoranda were prepared in duplicate showing the division arrived at and what property continued joint, one memorandum being retained by each brother.

The learned trial Judge framed issues of which the first two were —

1. Did the parties of this suit constitute a joint Hindu family even after the separation of their eldest brother Wadhawa Mal?

2 Did the parties of this suit separate in 1939 and therefore the suit in the present form does not lie?

The learned judge answered the first issue in the affirmative and the finding that the appellant and respondent remained joint after 1934 has not been challenged

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* P. C Appeal No 25 of 1944 17th December, 1945.

before the Board. The second issue, which the learned Judge answered in the negative, is the material one on this appeal.

The learned Judge held in the first place that the memoranda referred to in the written statement, which for purposes of identification were marked "C" and "D" constituted an instrument for partition and could not be given in evidence since they were neither stamped nor registered He gave the respondent the opportunity of paying the necessary stamp duty and penalty, but the respondent declined to make the payment The alleged fact that the documents have been stamped since judgment is immaterial.

Section 35 of the Indian Stamp Act, 1899 provides —"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped" The provisos do not apply in this case.

Section 49 of the Indian Registration Act provides that no document required to be registered under section 17 shall affect any immoveable property comprised therein or be received in evidence of any transaction affecting such property It is unnecessary to consider the effect of this section because the documents in question not being stamped, the wider prohibition contained in the Stamp Act applies, and the learned Judge rightly excluded the documents In the absence of written evidence of partition the learned Judge considered that the oral evidence called by the respondent to support a partition in February, 1939, was unsatisfactory, and accordingly he held the parties to have been joint at the date of suit and gave the appellant a decree

In appeal the High Court of Lahore considered only issue 2 They held that the oral evidence proved that partition between the appellant and the respondent took place on or prior to 21st February, 1939, and they expressed the opinion that the documents marked "C" and "D", even if they required to be stamped and registered, could be used to corroborate the oral evidence for the purpose of determining the *factum* of partition as distinct from its terms

With this latter opinion their Lordships are not in agreement As already noted, section 35 of the Indian Stamp Act enacts that no instrument chargeable with duty shall be admitted in evidence for any purpose Mr Rewcastle as part of his argument for the respondent adopted the note on the words "for any purpose" in section 35 contained in the 4th edition of Sir Dinshah Mulla's book on the Indian Stamp Act, 1899 He pointed out that the words "for any purpose" first appeared in India in the Stamp Act of 1879, and in England in the Stamp Act of 1891, and that under the earlier Acts there were decisions in both countries that an unstamped document might be admitted in evidence for a collateral purpose, that is, to prove some matter other than the transaction recorded in the instrument, and he submitted that these cases applied even under the later Acts. Their Lordships do not take this view. A document admitted in proof of some collateral matter is admitted in evidence for that purpose, and the statute enacts that it shall not be admitted in evidence for any purpose Their Lordships see no reason why the words "for any purpose" in the Indian Act of 1879 should not be given their natural meaning and effect Such words may well have been inserted by the Legislature in order to get rid of the difficulties surrounding the question of what amounted to a collateral purpose

Their Lordships therefore pay no regard to the documents marked "C" and "D" but they are in agreement with the High Court in thinking that the oral evidence proved partition in February, 1939 The respondent no doubt failed to prove the partition in 1934 which was alleged in his written statement, but the important question is whether partition had been affected before the institution of the suit in December, 1939 Two witnesses, Das Mal and Sain Das, gave evidence of a partition of the joint property in February, 1939, at which the witnesses were

present, and of the parties taking possession of the property allotted to them This evidence was supported by evidence that soon after February, 1939, some land revenue was paid separately by respondent, though previously it had been paid by both parties jointly, by evidence of two witnesses who stated that they had cultivated land belonging jointly to the parties, but that since April, 1939, they had paid the produce separately to each, and by the evidence of the respondent that for 1939-40 and 1940-41 he had submitted separate returns for income-tax Their Lordships think it unnecessary to discuss the evidence in further detail since this was done in both the lower Courts. In their Lordships' view the evidence establishes a physical division of much of the joint property in February, 1939, and this is only consistent with a severance in the status of the parties having taken place.

On that view of the matter, the appellant can get no more than the High Court gave him, namely, a declaration that he is entitled to a half share in the agricultural lands which the respondent admitted to be joint, and a preliminary decree for partition of the properties mentioned in the documents marked "C" and "D" and admitted by the respondent in such documents to be joint. It has been argued for the appellant that the decree of the High Court erred in referring to the documents marked "C" and "D" which were not admissible in evidence. But the documents were not used as evidence, they were employed merely as a convenient means of identifying the properties admitted by the respondent to be joint, thereby avoiding setting out the properties in a schedule to the order, which would have been the more regular course

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed The appellant must pay the respondent's costs of the appeal

Solicitors for Appellant *Douglas Grant & Dold.*

Solicitors for Respondent *Hy S L Polak & Co*

H J U /V S *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE PATANJALI SASTRI

The Commissioner of Income-tax, Madras .. *Applicant**

v.

Ve K R Savumiamurthy .. *Respondent*

Indian Income-tax Act (XI of 1922, as amended), section 4-B—" Seven years"—Mode of computing—Test of residence in British India—Hindu Joint family—Assessment of manager—Period of residence in British India —Exclusion of foreign income

The assessee who was the manager of a Hindu undivided family was assessed to income-tax and excess profits duty in respect of his business in British India and Ceylon on the footing that the family was "resident" and "ordinarily resident" in British India In each case the income taxed was of the "previous year," which was the Tamil year Pramathi ending 12th April, 1940, for the Indian business and the financial year ending 31st March, 1940, for the foreign business, the assessee's accounts in the two places having been made up to those dates respectively There was no dispute that the family was "resident" in British India within the meaning of section 4 (1) (*b*) read with section 4-A of the Indian Income-tax Act of 1922 as amended The assessee however contended that the family was "not ordinarily resident in British India" within the meaning of the second proviso to section 4 (1) read with section 4-B and that accordingly the income arising to it from the business in Ceylon should not be included in the assessment, there being no suggestion that such business was controlled in India or that such income was brought into British India It was shown that the manager was in British India for 606 days on the aggregate during the period of seven calendar years from 1st January, 1929, to 31st December, 1938, preceding the year of account, whether of the Ceylon or Indian business and that he was in British India for 731 days on the aggregate during the seven Tamil years preceding the year of account of the Indian business, and for 731 days on the aggregate during the seven financial years preceding the financial year 1939-40 which was the year of account for the Ceylon business It was contended that the "seven years" mentioned in clause (*a*) of section 4-B should be taken as seven calendar years and that as the manager was not resident in

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*R C No 11 of 1945 1st February, 1946

British India during that period for more than two years the assessee's joint family would be entitled to claim the exclusion of the foreign income from the assessment under section 4 (1) of the Act

Held, that the expression "seven years" in section 4-B of the Indian Income-tax Act should be taken as referring to the period of seven years of twelve calendar months each immediately preceding the commencement of the relevant year and that the case should be disposed of on that basis.

Case stated under section 66 (1) of the Act XI of 1922, by the Income-tax Appellate Tribunal, Madras Bench, in 66 R A 8 and 9, Madras, 1944-45.

C S Rama Rao Sahib for Applicant

P. R Srinivasan for Respondent

The Judgment of the Court was delivered by

Patanjali Sastri, J—This reference arises out of an assessment to income-tax and excess profits duty made on the respondent as the manager of a Hindu undivided family of the year 1940-41

The family was carrying on business at Kaketiruppupudur (Ramnad district) in British India and in Ceylon, and its income from both these sources has been taxed on the footing that the family was "resident" and "ordinarily resident" in British India In each case the income taxed was of the "previous year," which was the Tamil year *Pramathi* ending 12th April, 1940, for the Indian business and the financial year ending 31st March, 1940, for the foreign business, the assessee's accounts in the two places having been made up to those dates respectively There was no dispute that the family was "resident" in British India within the meaning of section 4 (1) (*b*) read with section 4-A of the Indian Income-tax Act, 1922, as amended by the Income-tax (Amendment) Act (VII of 1939) The assessee, however, contended that the family was "not ordinarily resident" in British India within the meaning of the second proviso to section 4 (1) read with section 4-B and that, accordingly, the income arising to it from the business in Ceylon should not be included in the assessment, there being no suggestion that such business was controlled in India or that such income was brought into British India

Now, a Hindu undivided family is deemed to be "ordinarily resident" in British India if its manager is ordinarily resident in British India [4-B (*b*)], and an individual and "not ordinarily resident" in British India "in any year if he has not been resident in British India in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in British India for a period of, or for periods amounting in all to, more than two years" [4-B (*a*)]. The assessee's attempt before the Income-tax authorities to prove that his family was not resident in British India in nine out of the ten years prior to the year of account having proved unsuccessful, he shifted his position before the Income-tax Appellate Tribunal (Madras Bench) and sought to bring the case under the latter part of the clause (*a*), contending that the "seven years" referred to in that clause must be taken to be seven calendar years The Tribunal ordered a fresh inquiry and it was found (*i*) that the manager of the family was in British India from 541 (this was subsequently corrected into 606) days on the aggregate during the period of the seven calendar years from 1st January, 1929, to 31st December, 1938, preceding the year of account, whether of the Ceylon or the Indian business, (*ii*) that he was in British India for 731 days on the aggregate during the seven Tamil years preceding Pramathi, the year of account of the Indian Business, and (*iii*) that he was in British India for 731 days on the aggregate during the seven financial years preceding the financial year 1939-40 which was the year of account of the Ceylon business. It will thus be seen that if the seven "years" mentioned in clause (*a*) be taken as seven calendar years, the manager cannot be said to have been in British India during that period for more than two years, and the assessee's joint family would be entitled, under the second proviso to section 4 (1) as a person "not ordinarily resident" in British India, to claim the exclusion of the foreign income from the assessment. The claim was accepted by the tribunal and the assessment was ordered accordingly to be reduced The Commissioner of Income-tax having challenged the correctness

of that view, the Tribunal has referred the following question to this Court for its decision :

> "Whether in the circumstances of the case, in computing the period or periods when the manager of the Hindu undivided family had not been in British India, the seven years in section 4-B of the Income tax Act should be taken as seven calendar years or seven previous years"

It may be mentioned here that the assessee raised before the Tribunal an alternative contention, *viz*, that, even if the aggregate period of the manager's stay in British India during the relevant years be taken as 731 days, it cannot be said to be "more than two years" as the seven years, however reckoned, must include at least one leap year But the Tribunal did not decide the point and it is not before us

It is necessary, in order to appreciate the contentions of the parties, to describe in brief outline the scheme of taxation laid down in the Act so far as it is material here The tax is levied for each financial year commencing on the 1st of April at the rate or rates prescribed in the Finance Act in force for the time being and is charged on the "total income of the previous year" (section 3) The "previous year" may be either the financial year next preceding or, at the option of the assessee, any other period of twelve months ending within such year if he has made up his accounts for such period It was held that an assessee could not have two separate "previous years" for the purpose of income-tax (*Commissioner of Income-tax* v. *Abubaker Abdul*[1], but this view was superseded by the amending Act, and it is now possible for an assessee to have a different "previous year" from each separate source of income (section 2 (11)) "Total income" is the total amount of income, profits and gains referred to in sub-section (1) of section 4 computed in the manner laid down in the Act (section 2 (15)) Section 4 (1) refers to four classes of income and proceeds for their assessment on a basis which differs according as the assessee is or is not "resident" or "ordinarily resident" in British India *during the previous year* of which the income falls to be assessed It is, accordingly, with reference to that year that the various tests of "residence" or "ordinary residence" as defined in section 4-A and section 4-B have to be applied The question is whether the "seven years preceding that year" mentioned in section 4-B (*a*) refers to the seven years ending on the day next preceding the commencement of the previous year or to the period of seven years ending on the 31st December preceding the commencement of such year as suggested for the assessee.

Mr P. R Srinivasan appearing for the assessee relies on section 3 (59) of the General Clauses Act (X of 1897) which provides that in all Central Acts and Regulations made after the commencement of that Act, unless there is anything repugnant in the subject or context "year" shall mean "a year reckoned according to the British calendar" As the Calendar (new style) Act, 1750 (24 Geo 2, c 23) transferred the beginning of the year in England from the 25th of March to 1st of January in and after 1752, it is urged that, in applying section 4-B (*a*), the seven years must be reckoned commencing from the 31st December, preceding the year of account and counting backward. We cannot agree It is obvious that this mode of computation would result in a gap, an interregnum, before the commencement of the "previous year" except, of course, where that year also began from the 1st of January Such a result is repugnant to the intendment of the provisions of section 4-B (*a*) read with section 4 (1) under which the *terminus ad quam* is the commencement of the "previous year" We find nothing in section 50 of the Act to which reference was made in the course of the argument to support the interpretation contended for on behalf of the assessee

It was said that if the "seven years" mentioned in section 4-B (*a*) were taken as referring to the period immediately preceding the year of account, it would give rise to the anomalous position of one and the same person being liable to assessment as "resident" in respect of some of his sources of income and as "not resident" in respect of others according to the "previous year" he has adopted for the respective sources This argument appears to have weighed very much with the Tribunal, but we see no force in it It is true, as has been stated, that under section 2 (1) as amended, it is possible for an assessee to have as many

1 (1935) I L R 60 Bom 679.

"previous years" as he has separate sources of income. But, as we have pointed out already, under the scheme of taxation laid down in the Act the charge is made on the total income of the "previous year", and such income has to be computed on the basis of the assessee's residence or non-residence in British India during that year That is to say, in respect of *each* separate source of income the year of account is to be ascertained, and if it is found on applying the provisions of sections 4-A and 4-B with reference to *that year* that the assessee was "resident" or "non-resident" or "not ordinarily resident" in British India as the case may be, the income of *that year* is to be computed on the appropriate basis indicated, and the toal of the amounts thus computed for all the sources of income, whether British Indian or foreign, is to be charged to tax Such procedure may prove cumbrous but not unworkable in its application to particular cases where the assessee has adopted different years of account for his separate sources of income, and it is possible in such cases that he should be assessed as resident in respect of some of the sources and non-resident in respect of others But this, in our opinion, is no reason for disregarding a construction to which the language of the provisions in question plainly points. And, after all, the construction contended for on behalf of the assessee, as we understand it, does not help to resolve the supposed anomaly as, even on such construction, an assessee may, in conceivable cases, have to be dealt with as resident and non-resident in respect of his different sources of income

We are, therefore, of opinion that the expression "seven years" in section 4-B of the Indian Income-tax Act should be taken as referring to the period of seven years of twelve calendar months each immediately preceding the commencement of the relevant year, and we answer the reference in that sense The assessee will pay Rs. 250 as costs of the Commissioner of Income-tax

B V V — *Reference answered against assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE LAKSHMANA RAO

Kadagalla Venkanna . *Appellant**

v

Indukuri Lakshmipathi Raju and others *Respondents*

Madras Estates Land Act (I of 1908), section 3 (2) (d), Explanation (inserted by Amendment Act of 1945)—"*Agraharam*"—*Grant of—If implies grant of whole village—Reservation of other lands and subsequent grant of portions out of it to other persons by the zamindar—Effect—Lands under first grant—If form an 'estate'—Tenants—If entitled to occupancy rights*

From the use of the word *agraharam* in a grant it cannot be implied that the grant was of the whole village when there are other lands in the village not included in such grant The portion granted will form an estate according to the Madras Estates Land (Amendment) Act of 1945 if the remaining lands described as "waste including the site of the village" retained by the Zamindar had been set aside by the zamindar for communal purposes Where however the zamindar is found to have granted two years later some portion to another person for his own benefit out of land reserved by him, it can only mean that the earlier grant was not of the whole village and the Act of 1945 cannot apply to make the lands under the earlier grant an "estate" the tenants whereof can have permanent occupancy rights

Appeal against the decree of the Court of the Subordinate Judge of Ellore in O S No 52 of 1943

B V. Subrahmanyam for Appellant

P Satyanarayana Raju and *E Venkatesam* for Respondents

The Judgment of the Court was delivered by

The Chief Justice—The plaintiff obtained a money decree against certain *agraharamdars* On the 7th January, 1941, at a Court sale held in execution of the decree he purchased 13 65 acres of land owned by the judgment-debtors under an *inam* granted in 1755 The first defendant was in possession of the land as the tenant, and the Court could only give the plaintiff symbolical possession This was given on the 30th April, 1942 The plaintiff filed the suit out of which the appeal arises on the 2nd October, 1943, to recover possession from the first defendant

* Appeal No 537 of 1944 28th January, 1946

and defendants 2 to 4 who are his sub-tenants The plaintiff alleged that he had obtained physical possession of the land from the first defendant and thereafter had granted to him a tenancy for one year from the beginning of May, 1942, on the condition that the first defendant vacated at the end of the year The first defendant was to pay by way of rent three-fourths of the produce of the two crops raised on the land He asked for a declaration of his title to the land, for the ejectment of the defendants, for the payment of Rs. 2,476 as arrears of rent for the year 1942-43, for mesne profits at the same rate and for the payment of Rs 305 as damages for waste The Subordinate Judge granted the plaintiff the declaration of title and a decree for possession ; but he dismissed the further claims of the plaintiff He disbelieved entirely the story of the oral lease The first defendant died after the trial and his son has filed the appeal as his legal representative He maintains that the Subordinate Judge erred in granting a decree for possession The plaintiff has filed a memorandum of cross-objections which has been limited to the finding of the Subordinate Judge that the first defendant was not in arrears of rent and to the order with regard to costs

It is common ground that unless the case falls within the Madras Estates Land (Amendment) Act, 1945, the decree for possession must stand That Act inserted in section 3 (2) (*d*) the following explanation

"where a grant as an inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purposes"

Before the passing of this Act the law was that unless the evidence showed that the grant was of the whole village, it was not an estate within the meaning of the Madras Estates Land Act In *Ademma* v *Satyadhyana Thirtha Swamivaru*[1], this Court held that where previous *inams* had been granted, the grant of the remaining lands in the village would not constitute a grant of the whole village so as to make the land granted an estate The object of the amending Act of 1945 was to ensure that where the grant was expressed to be of a village the lands granted would constitute an estate, notwithstanding that they did not include lands which had been already granted on service or other tenure or reserved for communal purposes Sub-section (2) of section 2 gave the Act retrospective effect from the date on which the Madras Estates Land (Third Amendment) Act, 1936, came into force which was the 20th October, 1936

In this case it is clear that the grant on which the first defendant relies did not cover the whole of the lands of the village There were certain lands, to which we shall refer later, which were granted as service *inams* and certain lands described as waste lands, including the site of the village, which had not been the subject of any grant The first defendant says that these facts do not affect his position because an examination of the *inam* register shows that the grant purported to be of the whole village. This interpretation of the *inam* register is not accepted by the plaintiff, who says that the record shows that two years after the grant of 1755 the zamindar made a grant of other lands in the village The original grant has been lost and the only evidence with regard to it are the entries in the *inam* register This shows that the total area of the village in 1859 when the Inam Commission was functioning was 669 74 acres, of which 475 78 acres were the subject of the *agraharam* grant on which the first defendant relies , 90 45 acres constituted " waste including site of village " , 69 03 acres were held under *bhattavritti* and *devadayam inams*, and 34 48 acres had been allotted as " village service *inams* "

The register is headed " register of *inams* in the village of Chintalapalli Agraharam in the taluk of Pentapad in the district of Kistna " The entry in column 8 (" description of *inam* ") is as follows " *Agraharam* granted for the personal benefit of the holder " The *agraharam* granted here admittedly refers to the 475 78 acres The word *agraharam* does not necessarily mean the whole of a village According to Wilson's Glossary it means a village, or a part of one, occupied by Brahmans, and held either rent free under special grants, or at a reduced rate of assessment

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1 (1943) 2 M L J 289

For the first defendant much reliance has been placed on the entry in column 22 ("decision of the Inam Commissioner or his assistants") This entry says "Sanad does not specify the extent of the *agraharam* or the description of the land as to dry or wet." It is suggested that the word "*agraharam*" here implies the grant of the whole village, but in view of the fact that there were still left 193 96 acres it is impossible to hold that the word "*agraharam*" comprised the whole village This does not, however, mean that the grant could not fall within the Act of 1945 It would fall within that Act if the 90.45 acres described as "waste including the site of the village" had been set aside by the zamindar for communal purposes, but the first defendant is here in a difficulty There is no evidence of this and the *inam* register shows that in 1757, that is two years later, the zamindar granted 7 98 acres to another person, one Varanasi Ramaswami, for his personal benefit On the evidence before the Court the only conclusion open is that the 7 98 acres came out of the lands reserved by the zamindar As we have indicated the *inam* register shows that there were waste lands not the subject of grant and "waste" does not necessarily mean land incapable of cultivation The *inam* statement mentions that the karnam had to point out where the 7 98 acres lay

The learned counsel for the first defendant has advanced numerous theories for which the record provides no support We can only have regard to the fact that after the grant on which he relies there was a grant by the Zamindar of other land, which can only mean that the earlier grant was not of the whole village. In these circumstances the Act of 1945 does not help him His appeal must be dismissed with costs of the plaintiff

Turning now to the memorandum of cross-objections, the finding of the Subordinate Judge that the plaintiff had not put the first defendant in possession of the lands and that the alleged lease was not true is accepted The Subordinate Judge describes the evidence given by the plaintiff's witnesses on this matter as "a mass of sickening perjury" If the plaintiff is capable of putting forward such a false story, he is capable of denying the payment to him of rent On the 29th March, 1943, the plaintiff wrote to the first defendant making the claims which he subsequently embodied in his plaint. The first defendant sent a prompt reply in which he denied the various allegations made against him and stated that he held two receipts for the payment of rent written in the handwriting of the plaintiff himself and signed by him. He gave the dates of the receipts. This letter was allowed to go unanswered and the suit was not filed until some six months later. The receipts were produced in Court at an early stage of the proceedings The necessity for a prompt payment of rent must have been well in the mind of the first defendant because if he fell in arrears he would lose his tenancy If he intended to put forward false receipts it is not likely that he would have produced receipts purported to have been written throughout by the plaintiff Moreover, on one of them there are two stamps and over each appears a signature

On behalf of the plaintiff criticism is made of the fact that only one of the attesting witnesses who signed the first receipt and neither of the attesting witnesses to the signature on the second receipt has been called The first defendant and one of the attesting witnesses to the first receipt gave evidence In addition, persons who carted the rental paddy for the plaintiff gave evidence This evidence has been believed and we find no sufficient reason for disbelieving it, which means that the finding that the first defendant paid his rent must stand.

The Subordinate Judge ordered each side to pay its own costs. It is said that he should have allowed the plaintiff costs on the value of the land as he obtained a decree for possession. We consider that the Subordinate Judge exercised a wise discretion in ordering the parties to pay their own costs The plaintiff had failed with regard to an important part of his case and had supported it by false evidence.

The memorandum of cross-objections is dismissed with costs in favour of the first defendant.

K S *Appeal and memorandum of cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE WADSWORTH AND MR JUSTICE RAJAMANNAR.

Ponnayya Moopanar ... *Appellant**

v.

Suppammal and others ... *Respondents*

Award—Reference—Parties executing muchilika to arbitrator—Provision for filing of statements and examination of witnesses—One party being absent—Other side examined and award given—Validity of award—Vagueness of reference—Misconduct of arbitrator

The parties to a suit executed a muchilika in favour of a named arbitrator in the following terms : "There has been some dispute between individual No 1 and individual Nos 2 to 5 in respect of the settlement deed which has been executed by individual No 1 of us in favour of individuals Nos 2 to 5 in respect of the former's moveable and immoveable properties and in view of the unnecessary expenses and losses and trouble which may befall the family on account of the said disputes, we have wholeheartedly executed this muchilika in your favour, agreeing that we would file the necessary written records as well as written statements before you, with regard to the aforesaid disputes that you may examine us personally and also the said documents and statements, etc , that you may make an award according to your conscientious opinion, and that we would abide by your decision and act accordingly If any one of us should act in defiance of the award to be given by you in pursuance of the said muchilika we agree hereby that the one-sided award to be passed by you shall be final We shall produce the said documents and the statements to be given by us, within one week from this day In case any one of us should fail to produce before you the statement of records, or if we should fail to appear on the dates to be fixed by you or if we should fail to adduce proof through witnesses we shall be bound by and act according to the decisions to be given by you, and we have executed this muchilika agreeing hereby to the above terms " The muchilika was executed on 18th January, 1940, but the arbitrator fixed 18th October, 1940, as the date of the enquiry, and he sent registered notice dated 13th October, 1940, requiring the parties to attend with their witnesses and written statements On 18th October, an application was made on behalf of one of the defendants for adjourning the case till the evening and the same was granted In the evening as there was nobody on defendants' behalf the arbitrator examined the plaintiff's witnesses and he announced his decision late that night On the succeeding day he also signed an elaborate written order whereby he held that the settlement deed was invalid and should be set aside

Held, that the muchilika was not a mere agreement to refer the dispute to arbitration but was itself an instrument making the reference, that there was no uncertainty in the reference and that the award passed was binding on the parties

Appeal against the decree of the Court of the Subordinate Judge, Tinnevelly, dated 18th December, 1943, in O. S No 55 of 1943 (O S No 17 of 1941, Subordinate Judge's Court, Tuticorin)

P N. Marthandam Pillai and *C Rangaswami Aiyangar* for Appellant

K Venkateswaran and *A V Avudainayagam* for Respondents

The Judgment of the Court was delivered by

Wadsworth, J—The appellant sued for a declaration of his title to the properties in schedule A to the plaint on the cancellation of the settlement deed dated 15th September, 1939, executed by him in favour of defendants 1 to 4 and alleged to have been so executed by reason of fraud, misrepresentation, undue influence, and coercion The trial Court on the facts found that there were no materials to justify a conclusion that there was any fraud, undue influence, misrepresentation or coercion invalidating the settlement deed It also found that the award made by the arbitrator, P W 9, on a reference by both parties regarding the dispute arising out of the settlement deed was invalid, not by reason of any misconduct of the arbitrator, but because of the invalidity of the reference which, according to the learned Judge is not a complete reference, but only an agreement to make a reference at some future date The plaintiff appeals.

The plaintiff was at the time of the suit aged about 50 His first wife died in 1935 and in 1936 he married a second wife By the first wife he had three daughters and one son The eldest daughter is the mother of the fourth defendant and the wife of one Chockalingam who figures prominently in the case The second daughter is the first defendant who is the mother of the second defendant The first defendant married a brother of this Chockalingam. The third daughter is the third defendant who herself married Chockalingam after her eldest sister's death. The son

* Appeal No 465 of 1944 28th January, 1946.

died on the 29th April, 1939, and it is his death which, it is alleged, upset the mind of the plaintiff to such an extent as to make him amenable to improper influence.

At the time of the marriage of the plaintiff to his second wife there was a settlement in her favour of some property. The settlement now attacked was executed on the 15th September, 1939, that is to say, nearly five months after the death of the settlor's son. It is evidenced by Ex P-1 On the following day the settlor executed a power of attorney in favour of his son-in-law Chockalingam with reference to certain charity properties which vested in the plaintiff, and three days later there was a sale deed executed in favour of an alleged creditor All the three documents were taken to the registry office on the same day ; but there was some seven days delay in the registration of the settlement deed About a fortnight later the plaintiff executed Ex D-6 dated 11th October, 1939, whereunder he settled on his second wife certain Travancore properties not covered by Ex P-1 On the 18th October, 1939, the plaintiff-appellant executed a cancellation deed which was duly registered and thereafter, on the 25th October, he sent a notice to the defendants, Ex P-5, in which he sets forth at considerable length his present case that he was wrongly influenced, tricked and defrauded when in a state of depression owing to his loss and improperly induced to execute a settlement deed As the result of this notice there was contest over the patta transfer proceedings and we are informed that there was also proceedings before the Magistrate under section 144 of the Code of Criminal Procedure. On 18th January, 1940, Ex P-6 was executed This purports to be a muchilika in favour of the arbitrator, P W 9, executed by the settlor (plaintiff) and by the first and third defendants, his surviving daughters, by Chockalinga as father and guardian of the minor fourth defendant, and by Arumuga Nainar as father and guardian of the minor second defendant This document recites

"There have been some disputes between individual No 1 and individuals Nos. 2 to 5 in respect of the settlement deed which has been executed by individual No 1 of us in favour of individuals Nos 2 to 5 in respect of the former's moveable and immoveable properties and which has been registered on 27th September, 1939 . and in view of the unnecessary expenses and losses and trouble which may befall the family on account of the said disputes, we have wholeheartedly executed this muchilika in your favour, agreeing that we would file the necessary written records as well as written statements before you, with regard to the aforesaid disputes that you may examine us personally and also the said documents and statements, etc , that you may make an award according to your conscientious opinion, and that we would abide by your decision and act accordingly If any one of us should act in defiance of the award to be given by you in pursuance of the said muchilika we agree hereby that the one-sided award to be passed by you shall be final We shall produce the said documents and the statements to be given by us, within one week from this day In case any one of us should fail to produce before you the statement or records, or if we should fail to appear on the dates to be fixed by you or if we should fail to adduce proof through witnesses we shall be bound by and act according to the decisions to be given by you , and we have executed this muchilika agreeing hereby to the above terms . . ."

The arbitrator, P. W. 9, is apparently a man of great wealth and considerable standing and he appears to have been somewhat leisurely in taking the enquiry According to his evidence, which the learned trial Judge believes, he was eventually pressed by the plaintiff and his son-in-law Chockalingam to take up the arbitration at once, and as a consequence of this pressure he fixed 18th October, as the date of the enquiry, and in order that everything should be on record, he also issued registered notice *vide* Ex. P-7, dated 13th October, 1940, requiring the parties to attend with their witnesses and to file written statements of their contentions. It is common ground that these notices were received. On the 17th October, Chockalingam despatched a notice to the arbitrator by registered post. This recites the fact of the reference to arbitration and states that the date of the hearing being fixed for 18th October, and notice having been given, the sender went to Tinnevelly and made enquiries "in order to prepare the statement and get it ready" and then he was told that it was improper to refer a matter to arbitration on behalf of minors and that this might lead to litigation after the minors attained majority Therefore he was giving notice that, inasmuch as the muchilika is beyond the authority of the writer he is not willing to have the hearing completed. This notice, being sent by registered post, took two days in transit. It appears to have been delivered on the 19th October, in the village, but the addressee being absent it was taken back and eventually delivered to him on the 22nd. Meanwhile the arbitrator,

P. W 9, took up the enquiry on the morning of the 18th October. He was then informed by the husband of the first defendant, D W 2, that Chockalingam would arrive at 5 p m with witnesses and ask for time and accordingly an adjournment was given until that time At 5 p.m nobody was there on behalf of the defendants. The arbitrator therefore proceeded to examine a number of witnesses produced by the plaintiff and late at night, on the conclusion of the enquiry, he announced his decision that in the circumstances the settlement deed should be set aside. This decision was embodied in a fairly elaborate written order which was completed the following day and signed by the arbitrator.

A great deal of the judgment of the trial Court is taken up with a consideration of the circumstances on which the plaintiff relies as indicating that the settlement deed Ex P-1 was brought about in such circumstances that it never was a valid document. We do not propose to go into this evidence at length because it seems to us perfectly clear that the trial Court is right in coming to the conclusion that there was nothing in the way of fraud, misrepresentation, undue influence or coercion such as to justify the setting aside of this deed No doubt the deed was executed when the plaintiff was staying where he was to some extent subject to the influence of the beneficiaries and it may be likely that he was persuaded by them to make the gifts that were embodied in the deed It is equally clear that after he completed this transaction he went elsewhere and came under the influence of his second wife's relatives and he was then persuaded to make a substantial settlement in favour of the second wife The fact that the plaintiff is amenable to persuasion is by no means a sufficient ground for setting aside transactions which he has executed when in full possession of his faculties. The theory that he was so beside himself with grief as not to know what he was doing is on the face of it absurd, for these transactions took place nearly five months after the death which is alleged to have upset his equanimity The plaintiff is not a young boy , nor is he an old man in his dotage. He is a man in the prime of life and his evidence in the box shows that he is not a person of a low grade of intelligence Nor is doubt thrown on the validity of this settlement deed by the fact that he bestowed some of his best properties upon his daughters and their offspring without making any immediate provision for his second wife, who, though young a woman, was childless After all he had already made a settlement on the second wife, and as the events show, he was prepared to make a further settlement which would be a fair provision for her and any child that she might have. The plaintiff in his anxiety to make up a case of undue influence falsely stated that the properties covered by Ex P-1 were worth Rs 30,000 and for that false statement he has had to pay a quite excessive court-fee. The object of his prevarication was clearly to make out that the settlement in favour of the defendants was a settlement of substantially all his property, which was certainly not the case The learned Judge of the trial Court finds that the properties covered by Ex P-1 would be worth not very much more than the amount of Rs 4,000 at which they were valued in the deed itself and that the amount bestowed upon the second wife by the later deed Ex. D-6 is not totally disproportionate. There are, therefore, in the circumstances of the execution of this deed and the conduct of the plaintiff himself no materials sufficient to justify a conclusion that it was *ab initio* a void or voidable document

There is, however, the decisive fact that the dispute between the parties regarding the validity of Ex P-1 was referred to an arbitrator who, after what appears to have been a regular enquiry, has found that the settlement should be set aside. If this finding binds the parties, whatever we may think of the merits of the contentions placed before the arbitrator, the plaintiff is entitled to treat the settlement as void. Now the learned Subordinate Judge has come to a conclusion which we find it rather difficult to understand He points out that the muchilika Ex P-6 requires the parties to produce statements before the arbitrator at some later date and he observes :

"The whole of this muchilika proceeds on the footing that the matters in dispute between the parties had to be later mentioned to the arbitrator by them and that this muchilika is only an agreement to refer their disputes and not an actual reference"

and he comes to the rather surprising conclusion that because one set of parties did not appear and make a statement regarding their claims, there was no actual reference at all which the arbitrator was competent to decide. Quite clearly this muchilika Ex P-6, is not, and does not purport to be, a mere agreement to make a reference at some future date It is no doubt an agreement and so must necessarily be any reference to arbitration outside the Court. But if it purports of itself to be an instrument which clothes the arbitrator with jurisdiction to make an enquiry and give an award, the fact that the enquiry is to take the usual form of getting written statements from both parties and examining witnesses before the award is given, is certainly not a ground for holding that the agreement is not a reference

At attempt has been made in the course of argument to put the objection in rather a different way It has been suggested that although the parties did intend Ex P-6 to be a reference to arbitration, the subject-matter of the dispute is described so vaguely that the contract embodied in the reference must be deemed to be void for uncertainty This contention must also fail There is, in our opinion, no uncertainty whatever about this reference. The document refers to the dispute between the parties in respect of the particular settlement deed of which full details are given. The attitude of the plaintiff in attacking this settlement deed has already been set forth at some length in the notice Ex P-5 given to the defendants and the disputes had been to a considerable extent crystallised in the patta transfer proceedings and the criminal proceedings Everybody knew what the dispute was about and what was the attitude of both the parties There is no such uncertainty regarding the matter referred as could not be cleared up in a very brief enquiry by the arbitrator. It is, moreover, not the rule that an agreement to submit a dispute to arbitration should set forth in full detail every matter which is in dispute A common form in use in England is "All disputes arising out of the contract" and in Russell on "Arbitration" the suggested form for submission to arbitrators of disputes arising out of a contract for purchase runs as follows

"Whereas by an agreement dated and whereas disputes and differences exist between the said (vendor) and the said (purchaser) respecting the said agreement and otherwise relating the promises Now these presents witness that it is hereby agreed as follows, that is to say (1) All disputes and differences which exist between the said parties, and also all other disputes and differences that may, at any time or times before the last ten days immediately preceding the day which shall be appointed by the arbitrator hereinafter named for his first sitting in the arbitration to be made in pursuance of these presents exist between the said parties, or any matters and things relating thereto, or arising out of the said agreement, shall be referred to the arbitration of "

When such a wide form is prescribed in the standard work for arbitration, it seems to us absurd to contend that the much more precise indication of the subject-matter of the dispute referred to the arbitrator in this case is, of such uncertainty as to make the agreement void We have no doubt that the reference to arbitration in Ex P-6 is complete and sufficient

An attempt has been made to suggest that the award is bad by reason of some not very clearly defined misconduct on the part of the arbitrator The arbitrator is alleged to have rushed the enquiry and not given time to the defendants to resile from the arrangement The arbitrator himself has said that he was being pressed by both parties to finish the work and that he gave an adjournment of the extent asked for by D W 2 on the day fixed for the arbitration His evidence is accepted by the learned trial Judge and we see no reason to take a different view. Nor can we accept as proved some vague suggestions that there may have been misconduct in avoiding the receipt of cancellation notice until after the result of the arbitration had been reduced to writing. The arbitrator is evidently a man of local position and there is no apparent reason for him to favour either side

A further point taken by the respondents relate to the position of the minors with reference to this award No doubt the reason given by Chockalingam for resiling from the arbitration agreement was a doubt raised regarding the legality of arbitration on matters in which minors were concerned But there is no specific plea in the defendants' written statement that the award is not binding on the minors as such or that it is invalid because it is the result of a reference which was not for

the benefit of the minors or was the result of misconduct on the part of the minors' guardian It cannot, we think, be contended that the natural and legal guardian of a minor is incompetent to make a reference to arbitration on a matter with regard to which a reference is for the benefit of the minors The cases on the point are summarised in *Ramji Ram* v *Saligram*[1] The question whether the minors when they attain majority can attack this arbitration or claim anything under the settlement deed as unaffected by the award of the arbitrator, is one which we cannot now decide and we leave it open to be decided if and when it is raised before a competent Court by the minor executants, second and fourth defendants on attaining majority For the present it is sufficient to state our opinion, that the plaintiff is entitled to claim that by reason of the award of the arbitrator, the settlement deed has been cancelled and that he has a right to recover the properties granted thereunder

The position of one item of these properties is peculiar The plaint seeks relief only in respect of the properties in schedule A Item 2 of schedule B was sold by defendants 1 to 4 under Ex D-4 on 20th December, 1939, to the fifth defendant. This sale was after the plaintiff purported to cancel Ex P-1 but before there was any reference to arbitration The curious feature of the present case is that the plaintiff also asserts that he has sold this item to a third party and he does not claim any relief with reference thereto Yet he impleaded the fifth defendant in the suit and he has impleaded him in the appeal, asserting that he is a necessary party. It seems to us that in view of the fact that the plaintiff is not claiming any right in this property now and in view of the fact that the fifth defendant obtained title at a time when there was subsisting an apparently valid settlement deed in favour of his vendors, the suit had necessarily to be dismissed so far as he was concerned with costs and he is also entitled to the dismissal of the appeal as against him with costs

In other respects the appeal is allowed and the plaintiff will have a decree declaring his right to the properties in schedule A, the settlement deed being cancelled in so far as it relates thereto, subject, however, to any right which the minor defendants may have on attaining majority to attack the award which is the basis of this decision The plaintiff will also be entitled to recover possession of the property in schedule A and mesne profits from the date of the plaint

As regards the costs payable by defendants 1 to 4 it seems to us that the amount of costs has been unduly inflated by the untrue assertion of the plaintiff that the properties were worth Rs 30,000 when they are in fact worth approximately Rs 4,000. The plaintiff will therefore be entitled to recover costs in the suit and in the appeal from defendants 1 to 4 at the rate at which they would have been payable had the suit and appeal been valued at Rs 4,000

B V V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE HAPPELL

Lingala Bugga Reddi .. *Appellant**

v.

Yennam Pedda Yerikala Reddi and others *Respondents*

Hindu Law—Promissory note by father—Suit by endorsee against the executant without impleading sons—Decree—Subsequent partition between father and sons—Right of decree-holder to proceed in execution against the property in the hands of the sons—Civil Procedure Code (V of 1908), *sections* 50 *and* 53

The appellant, an endorsee of a promissory note executed by a father alone, obtained a decree against the father He and his sons, the respondents, divided subsequently An application under sections 50 and 53, Civil Procedure Code, was taken out by the decree-holder against the respondents to have them made parties to the execution application On the question whether in the circumstances

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1 (1911) 14 C L J 188

* A A A O No 152 of 1945 8th February, 1946

the decree-holder was entitled to proceed agsinst the coparcenary property in the hands of the respondents in execution or whether his remedy was not to proceed against this property by way of a separate suit,

Held, that it had no doubt been held that where the sons had been impleaded, though exonerated, the decree-holder could proceed against the interest of the sons after partition, but there was no authority for the view that this procedure could be adopted where the sons were not parties at all to a suit brought by an endorsee of a promissory note executed by the father.

Venkatanarayana Rao v *Somaraju*, (1937) 2 M L J 251 I L R (1937) Mad 880 (F.B); distinguished.

Appeal against the order of the District Court of Kurnool dated the 12th day of February, 1945, and made in A S No 52 of 1944, preferred against the order of the Court of the District Munsiff of Nandyal dated 11th March, 1944, and made in E. A No 615 of 1943, in E P No 313 of 1943 in O S No 169 of 1941

P. Satyanarayana Rao for Appellant

Respondents not represented

The Court delivered the following

JUDGMENT —The appellant obtained a decree against the father of the respondents in O S No 169 of 1941 on 20th October, 1941. Subsequently the respondents and their father divided and this appeal arises out of an application by the appellant under sections 50 and 53 of the Code of Civil Procedure to have the sons made parties to the execution application and to proceed in execution against their shares The petition was allowed by the District Munsiff, but the District Judge of Kurnool allowed the appeal to him and dismissed the application.

The question is whether in the circumstances of the case, the decree-holder was entitled to proceed against the coparcenary property in the hands of the respondents in execution or whether his remedy was not to proceed against this property by way of a separate suit In my opinion, the decision of the District Judge is correct. It has no doubt been held that where the sons had been impleaded though exonerated the decree-holder could proceed against the interest of the sons after partition, but there is no authority for the view that this procedure can be adopted where the sons were not parties at all to a suit brought by an endorsee of a promissory note executed by the father In *Venkatanarayana Rao* v. *Somaraju*[1], the decree was against the father in his capacity as manager of the family The appeal fails and is dismissed. As the respondent is not represented, no order is made as to costs

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE CHANDRASEKHARA AIYAR

Subbiah Pillai .. *Appellant**

v.

Muthathal Achi .. *Respondent.*

Stamp Act (II of 1899), section 35—Scope and effect—Usufructuary mortgage evidenced by unstamped documents—Invalidity—Mortgagee admitting possession and claiming prescriptive right under the invalid mortgage—Suit by mortgagor to redeem property —If barred ?

In a suit for redemption of a usufructuary mortgage created under an unstamped *muri* though the plaintiff cannot rely on any secondary evidence of the unstamped *muri*, where the mortgagee had in a prior suit admitted that he had acquired title as usufructuary mortgagee by enjoyment for over the prescriptive period, the mortgagee cannot deny the mortgagor's right to redeem the property. Where the *muris* were relied on not as evidence of a mortgage sought to be redeemed but only to show how the prescriptive right was created in the defendant, the suit is maintainable.

Thaji Beebi v *Tirumalaiappa Pillai*, (1907) 17 M L J 308 I L R 30 Mad 386, distinguished

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1 (1937) 2 M L J 251 · I L R (1937) Mad 880 (F B).

* S A No 629 of 1945 7th February, 1946

Appeal against the decree of the Court of the Subordinate Judge, Sivaganga, in A. S No 61 of 1944, preferred against the decree of the Court of the District Munsiff, Sivaganga, in O S No 315 of 1943

T. Krishna Rao and *R Subrahmanyam* for Appellant

V. Ramaswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT —The defendant has preferred this second appeal and he repeats the contention taken by him before the lower Courts that as the usufructuary mortgages now sought to be redeemed by the plaintiff were evidenced by unstamped *muris* or *cadjan* leaves, no proof is admissible in support of the claim for redemption and that even if the defendant has admitted that he was holding under such mortgages, it would be of no avail to the plaintiff, as the admission would only be secondary evidence of the contents of the unstamped documents which not only could not be received in evidence, under section 35 of the Stamp Act but should not even be acted upon for any purpose whatever. The decision in *Thaji Beebi* v. *Tirumalaiappa Pillai*[1] is strictly relied on in support of this position.

As pointed out by the learned Subordinate Judge, the unstamped *muris* must be with the defendant and he would not produce them This by itself is not however a fact of any importance in connection with the question now raised, because, once it is conceded that the mortgages are evidenced by unstamped documents, even their suppression by the defendant would not render the position for the plaintiff any the better as the prohibition in section 35 will be attracted and come into play. The several *muris* under which the usufructuary mortgages were created are referred to in the plaint on the strength of the recitals in Ex P 6, an assignment in favour of the defendant by the original othidar or his legal representatives The defendant resisted the redemption only on this ground and no other. Though he had pleaded that he was the owner of the property he conceded later that the plaintiffs were the owners He did not state in his written statement in so many words that he held possession under the usufructuary mortgages referred to in the plaint and this silence on his part entitled the District Munsiff to say that the possession of the defendant and his predecessor in title of the rest of the items for more than 12 years prior to suit is not that of a usufructuary mortgagee But, on appeal, the defendant's vakil conceded that his client was in possession only as a usufructuary mortgagee and that he had acquired title as usufructuary mortgagee by enjoyment for over the prescriptive period

Thaji Beebi v *Tirumalaiappa Pillai*[1] would apply if the suit was merely one for redemption of the usufructuary mortgages created under the unstamped *muris*. But the plaintiff has taken care in this suit to say (*vide* paragraph 10 of his plaint) that he seeks to redeem from the defendant who had held possession as a usufructuary mortgagee under documents not valid in law to create any such rights in his favour. The defendant cannot deny the plaintiff's right to redeem this usufructuary mortgage right which he so acquired by prescription. The dates given for the cause of action in paragraph 14 were referred to by Mr T Krishna Rao, the learned advocate for the appellant, in support of his argument that the suit was to redeem the *muri* mortgages But the dates would have had to be given even with reference to the prescriptive rights acquired by the defendant by reason of possession for over 12 years under mortgages not valid in law This is not a case where the plaintiff seeks to redeem a mortgage, and being unable to establish it, wants to redeem another mortgage, admitted by the defendant The *muris* were set out in the plaint only to show that invalid mortgages were created in favour of the defendant, giving rise to a prescriptive right as usufructuary mortgagee in defendant's favour. This prescriptive title was admitted by the defendant The learned Subordinate Judge allowed redemption on this basis and I do not think that he was wrong.

The second appeal is dismissed with costs. No leave.

K S. *Appeal dismissed.*

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1. (1907) 17 M.L J. 308 · I.L.R 30 Mad 386.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE RAJAMANNAR.

M. Y. A. A Nachiappa Chettiar .. *Appellant**

v.

M. Y A A Muthu Karuppan Chettiar and others . . *Respondents.*

Civil Procedure Code (V of 1908), section 16—Suit for partition of immoveable property in Ceylon being assets of money-lending firm owned by a Hindu joint family in British India—Jurisdiction—Suit if can be treated as one for taking accounts of a dissolved partnership or for enforcement of a trust—Law applicable to transfers of immoveable property—Hindu Law—Joint family—Father—If can dispose of property by will or gift—Jeshtabagam—*If permissible—Coparcener mentioning invalid will in muchilika agreeing to division by a panchayat—If bar to subsequent questioning the validity of such transfer*

A British Indian Court has no jurisdiction to decree a division of immoveable properties situate in Ceylon or even to decree that such properties are partible joint family properties Such property cannot be treated as personalty for purposes of jurisdiction The fact that the properties are assets acquired by a money-lending business owned by a Hindu joint family in India will not have the effect of converting them into partnership assets so as to enable the British Indian Court to treat the suit as one for the taking of accounts of a dissolved partnership Nor can the suit be treated as one for the "enforcement of a trust" so as to enable the British Indian Court to act *in personam* The manager of a joint Hindu family is not under any of the well-known obligations of a trustee with regard to the administration of the funds of the family

A capacity to alienate immoveable properties by will is governed by the *lex situs*

But if the properties were situate in British India the Hindu Law will be applicable and the father in a joint family cannot dispose of family property by will, settlement or gift What is known as *jeshtabagam* is now obsolete

A coparcener executing a muchilika agreeing to a division of properties by a panchayat mentioning the invalid transfers by gift or will, will not be barred from questioning their validity by the application of any principle of election or ratification or doctrine of approbate and reprobate as even an admission made on a wrong impression of the law will not bind the party

Appeal against the decree of the Court of the Subordinate Judge, Devakottah, in O S No 54 of 1942

V Ramaswami Aiyar for Appellant.

The Advocate-General (*K Rajah Aiyar*), *R Rangachari* and *S Tyagarajan* for Respondents

The Judgment of the Court was delivered by

Rajamannar, J—The plaintiff, who is the appellant and the first defendant who is the first respondent are the sons of one M Y A Annamalai Chettiar The plaintiff is the son by the second wife and the first defendant by the first wife. Defendants 2 to 4 are the sons of the first defendant. The fifth defendant is the mother of the plaintiff and the sixth defendant is his sister Annamalai died on 18th September, 1926 Before his death he executed on 21st August, 1926, a will (Ex D-1) in and by which, after stating that he owned a money-lending firm in Puttalam and immoveable properties and moveables, etc , in Karaikudi, he appointed two persons as executors and provided that his eldest son, the first defendant, should get immoveable property worth Rs 35,000 as *jeshtabagam* from and out of his properties after his lifetime He also made certain provisions for his junior wife and others and finally directed that all his remaining moveable and immoveable properties should be taken by his two sons, the plaintiff and the first defendant, in equal moieties On the same day he executed a power of attorney in favour of one Lakshmanan Chettiar conferring on him power to sell to any person all or any of his lands, leases and charges and to sign and execute all necessary transfers and other instruments and to execute a deed of gift of the properties that he possessed in Puttalam in favour of his sons Muthukaruppan and Nachiappan (first defendant and plaintiff) In pursuance of the power conferred on him by this document, Lakshmanan Chettiar on behalf of Annamalai Chettiar executed on 2nd September, 1926, two documents, *viz* , (1) a deed of gift of properties valued at about Rs 1,65,000 in favour of the first defendant and the plaintiff in equal moieties (Ex D-3), (2) a deed of sale in favour of the first defendant alone of immoveable properties for a

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* Appeal No 239 of 1944 18th December, 1945

sum of Rs 32,500, the consideration being stated as a portion of the sum agreed to be paid by the vendor, i e, Annamalai, to the first defendant at the time of his (Annamalai's) second marriage (Ex 29-a) On the same day one M Y. A. Chidambaram Mudali, another agent of Annamalai, made in favour of the first defendant a transfer of a leasehold of certain properties for a consideration of Rs 2,500 (Ex. 29-b). Admittedly this leasehold right belonged to Annamalai himself All these three documents related to immoveable properties in Ceylon and were registered there on 18th September, 1926

The first defendant was a minor at the time of his father's death, but attained majority soon thereafter and the estate appears to have been handed over to him by the executors sometime in 1931 and ever since he has been in control of the affairs of the family including the business The plaintiff attained majority in April 1939, and was married in May 1940 Sometime before the marriage there appears to have been an attempt to bring about a division by a Panchayat. Ex D-11 is a muchilika executed both by the plaintiff and the first defendant on the 1st May, 1940, in which they both agree to arrange for a Panchayat being constituted in the month of Ani that year and for a partition to be effected within Avani The legal effect of this document will have to be considered later It is enough now to state that nothing came out of this muchilika On the 1st December, 1941, the plaintiff issued a notice demanding partition and the suit was filed on the 17th June, 1942

According to the appellant's allegations in the plaint the family properties comprised the following (1) Immoveable properties in British India set forth in Schedule A to the plaint, (2) A money-lending firm at Puttalam in Ceylon; and (3) Moveables in the shape of jewels and silver ware

The plaintiff alleged that his father had no power of disposition, as the properties belonged to the joint family and the will was consequently void He also averred that the provision in the will allotting immoveable properties worth about Rs 35,000 to the first defendant as an extra share was invalid and not binding on him. He prayed for the following reliefs

(a) that an account may be taken of the joint properties of the family ;

(b) that the first defendant may be directed to render an account of his management of the family properties including the firm of M Y A at Puttalam,

(c) that a scheme may be settled for the due management of the charities mentioned in the schedule *infra* ,

(d) that after providing for the interests of the fifth and sixth defendants herein, the *bona fide* liabilities of the family, if any, be discharged and the residue of the property of the said family may be divided between the plaintiff and the first defendant in equal shares, defendants 2 to 4 continuing to be joint along with the first defendant ,

(e) for the appointment of a receiver of the family properties and to issue an injunction to restrain the first defendant from selling, charging or otherwise disposing of any of the family properties ,

(f) for the appointment of a Commissioner to divide the joint family properties by metes and bounds ,

(g) that the first defendant may be directed to pay the costs of the suit to the plaintiff , and

(h) for such other reliefs as the Court deems fit

The schedule to the plaint described the immoveable properties situated in British India.

The written statement of the first defendant who was the main contesting defendant is the most material in the case and brought out many facts not even adverted to in the plaint The first defendant pleaded *inter alia* that the Court had no jurisdiction to entertain the suit in so far as it related to immoveable properties situate in Ceylon , the plaint never made mention of any immoveable properties in Ceylon; but it is now common ground that there are immoveable properties of

considerable value in Ceylon, either acquired with the profits of the money-lending firm, or forming the assets of the firm The first defendant further stated that it was perfectly competent to his father to dispose of his properties in Ceylon by will, because the joint family system was unknown to the law as administered in Ceylon. He referred to the three documents of September, 1926 executed by his father's agent already mentioned His case was that the two documents in his favour were executed in discharge of a promise by his father at the time of his second marriage with the plaintiff's mother The first defendant also relied upon the muchilika dated 1st May, 1940, and pleaded that the plaintiff was precluded thereby from impeaching any of the conveyances by his father in his favour The first defendant was otherwise willing to a partition of properties situate in British India

There was a rejoinder by the plaintiff in which the validity of the conveyances relied upon by the first defendant were impeached and it was also stated that they were executed merely for avoiding the heavy death duties prevailing in Ceylon and were never intended to be real transactions governing the rights of the family . . . The plaintiff further stated that the documents had been executed by persons not duly authorised.

Issues were framed both on the merits and on the question of jurisdiction The learned Subordinate Judge held that he had no jurisdiction to entertain the suit in respect of the immoveable properties in Ceylon and made a decree in favour of the plaintiff for partition of the immoveable properties in British India and for division of the moveable properties existing in Ceylon including the money-lending firm in Puttalam, but excluded from the scope of the decree the immoveable properties situate in Ceylon In determining the income from the immoveable properties in Ceylon as part of the assets of the business, the income derived from the properties conveyed to the first defendant by the two deeds referred to in the written statement was directed to be excluded from the account, as the title of the first defendant to these properties could not be determined here A Commissioner was appointed for dividing the British Indian properties by metes and bounds into two equal shares of which the plaintiff would be entitled for delivery of one share. There was also a decree in favour of the plaintiff for a half share of the net assets of the money-lending business in Puttalam.

The fifth and sixth defendants had made claims for maintenance and residence and for an account of certain moneys deposited with the family and the Subordinate Judge made certain directions regarding them, which will be referred to later on. The plaintiff has filed this appeal in respect of the immoveable properties in Ceylon, which have been excluded from the decree made by the trial Court and the fifth and sixth defendants have filed a memorandum of cross-objections in respect of some of the reliefs claimed by them

To decide the question of jurisdiction raised in this case, it is necessary to recapitulate the following facts There is a joint family business at Puttalam in Ceylon There are immoveable properties in Ceylon, which have either been acquired out of the profits of this business, or during the course of the business by being bought in in discharge of debts owing to the business Out of these, properties of a stated value of Rs 35,000 have been conveyed by the father to the first defendant alone by means of two documents executed in Ceylon The plaintiff challenges the validity of those transfers. There is, therefore, a dispute as regards the title to the immoveable properties comprised in these deeds. The plaintiff claims a half share in these properties as well

It is necessary to state at the outset that for the purpose of deciding this question the suit should be considered to be an ordinary suit for partition of joint family properties in which *inter alia* there is a dispute as regards the partible nature of certain items of immoveable property There are of course the incidental reliefs of accounting, framing of a scheme for the managment of the charities, the appointment of a receiver, etc , but these are not really material. Essentially the suit is one for partition of what are alleged to be the properties of an undivided Hindu family. During the course of his argument, Mr Ramswami Aiyar tried to introduce a new element based on a new conception affecting the nature and scope of the present

suit He suggested that it was in part a suit for the taking of accounts of a dissolved partnership He sought to treat the joint family business on a separate footing as if it were a contractual partnership with all its legal incidents He began to describe the immoveable properties in Ceylon as assets of the business, presumably in contra-distinction to assets of the joint family

It is clear that it would be totally wrong to import the incident of a partnership to work out the rights and liabilities of the members of a trading family, engaged in a business The joint family carrying on its ancestral trade is not a partnership in law Section 5 of the Partnership Act is a statutory recognition of this position Venkatasubba Rao, O C J , says in *Ramaswami Chettiar* v *Srinivasa Iyer*[1]

"The true legal position, therefore is, that as between the coparceners, the fact that the family is engaged in trade does not convert it in relation to that trade, into a partnership " (*Vide* Mayne, 10th edition, S 304)

It follows that in the case of families whose occupation is trade, there is no distinction between family properties and trade assets. All the trade assets will be joint family property Likewise the entire joint family property will be liable for the debts incurred in the trade. The fact that any particular property was acquired with the profits of the business would not impress such property with any peculiar incident as an item of partnership asset We shall have to refer again to this aspect when dealing with one of the contentions of the appellant on the question of jurisdiction

Treating the suit as one for partition of immoveable property, it would fall directly within section 16 (*b*) of the Code of Civil Procedure, according to which a suit for the partition of immoveable property should be instituted in the Court within the local limits of whose jurisdiction the property is situate . But the explanation is important It says that in this section " property " means " property situate in British India " The result is that a suit for partition of immoveable property outside British India would not be covered by this provision To determine, therefore, whether the Court of the Subordinate Judge of Devakottah has jurisdiction to entertain this suit in so far as it is, or as it must be deemed to be for partition of immoveable properties in Ceylon, that is, outside British India, one must go to the well-established rules of private international law

The basic rule appears to us to be undisputed It is stated thus by Dicey 5th edition, page 203) :

"Subject to the exception hereinafter mentioned, the Court has no jurisdiction to entertain an action for (1) the determination of the title to, any immoveable situate out of England (foreign land) , or (2) recovery of damages for trespass to such immoveable , or (3) the administration of a foreign charity under the supervision of the Court or the settlement of a scheme for such a charity "

In Halsbury (2nd edition, volume 6 at page 218) the rule is stated in the following terms

"The English Courts have, in general, no jurisdiction to determine directly the title to a foreign immoveable, nor can they entertain any action which substantially involves the determination of such title "

Parker, J , in *Deschamps* v *Miller*[2], states the rule in similar terms :

"In my opinion, the general rule is that the Court will not adjudicate on questions relating to the title to or the right to the possession of immoveable property out of the jurisdiction "

This rule is founded on the general principle that the Courts of any country have no jurisdiction over, that is, have no right to adjudicate upon any matter with regard to which they cannot give an effective judgment. No nation can execute its judgment against immoveable property in the country of another Moreover, if the Sovereign of a country has, in fact, the power to transfer the ownership or possession of property in that country, it would only be the judgment of his Courts in regard to such property, which would be decisive as to the right to such property. This rule has been uniformly applied both in England and in India. In *British*

1. (1935) 70 M L J 214 at 216 2 (1908) 1 Ch. 856 at 863

South Africa Co., v. *Companhia de Mocambique*[1] it was held by the House of Lords that the Supreme Court of Judicature had no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad even in a case when there was no competent Court in the country in which it was situate In In re *Hawthorne Graham* v *Massey*[2], the title to certain immoveable property in Saxony was in dipute between *A* and *B* A sold the property in Saxony, received payment of the purchase money and took a mortgage for the balance. Both *A* and *B* being in England, an action was brought by *B* to make *A* account for the purchase money, but the suit was dismissed for want of jurisdiction. In *Deschamps* v *Millar*[3], it was held that the English Court will not adjudicate on a question of title to immoveable property situate in Madras. In that case the plaintiff sought to impeach a settlement made by his father of immoveable property in Madras.

The Judicial Committee in *Nilkanth Balwant* v. *Vidya Narasinha*[4], held that a Court in the Bombay Presidency had no jurisdiction to try a suit on a mortgage so far as it related to properties in Kolhapur state, which is outside British India. At page 502 their Lordships say

"Inasmuch as the properties in Kolhapur are not within the jurisdiction of any Court in British India the learned Subordinate Judge of Satara had no jurisdiction to try this suit so far as it related to the mortgage properties situate in Kolhapur "

Courts have refused to entertain applications to file an award, which dealt with immoveable properties outside British India (vide *Krishnier* v *Subbarama Aiyar*[5] and *Upendranath Basu* v *Het Lal*[6]).

Cases of partition are more apposite The rule in England is stated in Halsbury 1st edition Vol. 21 at page 838 thus

"The Chancery division has no jurisdiction to order partition of immoveable property outside the jurisdiction "

The early case of *Cartwright* v. *Pettus*[7] is considered authority for this rule In that case the Lord Chancellor refused to direct a partition of lands in Ireland, though the parties were in England. Cheshire in his " Private International law ", 2nd edition, at page 539 refers to this case as exemplifying the general principle that no action raising the question of the title to immoveables can be entertained by an English Court In *Keshav* v *Vinayak*[8] the plaintiffs filed a suit for a declaration of their title to a third share in what they alleged was joint family property, *viz*, certain annual allowances from the Government of the Nizam charged on two villages, and to recover their share from the defendants to whom the allowances had been paid While the plaintiffs alleged that the allowances were joint ancestral property the defendants contended that they were the exclusive property of their grandfather to which the plaintiffs' branch had no right. It was held by Parsons and Ranade, JJ , that the District Court of Nasik in which the suit was filed had no jurisdiction to try the suit, because the allowances were in the nature of immoveable property and there was a *bona fide* dispute as to the title to them and that the plaintiffs could not claim a declaration of title, or ask for the refund of the allownaces in a British Court merely because the defendants happened to be residents in British territory In *Krishnaswami* v. *Venugopal*[9], one *K* filed in 1932 a suit in the Court of the Subordinate Judge of Trichinopoly for recovery of possession of certain properties moveable and immoveable, or in the alternative for partition of those properties A large part of the immoveable properties was situated in Burma, the others being within the jurisdiction of the Court of the Subordinate Judge of Trichinopoly On 1st April, 1937, when the Government of India Act, 1935, came into operation, Burma ceased to be part of India and a question was raised that the Court of Trichinopoly ceased to have jurisdiction thereafter in respect of the properties situated in Burma and it was held by Mockett and Kunhi Raman,

1 (1893) A C 602
2 (1883) L R 23 Ch D 743
3 (1908) 1 Ch 856
4. (1930) 59 M L J 379 L R 57 I A 194 I L R 54 Bom 495 (P C)
5 (1932) 62 M L J 550 I L R 55 Mad 689
6 (1933) I L R 55 All. 542
7. (1675) 22 E R 916
8. (1897) I L R 23 Bom 22
9. (1942) 1 M L J 137 I L R (1942) Mad. 376

JJ, that the Subordinate Judge of Trichinopoly could continue to pass a decree affecting the properties situated in Burma also, because the right to continue a suit properly filed in a British Indian Court before 1st April, 1937, had not been taken away by the Government of India Act, 1935 But it is clear from the judgment that the decision would have been just the other way if the suit had been commenced after 1st April, 1937, *i e*, after Burma had ceased to be part of British India. At page 381 Mockett. J, says .

"It is a basic principle of Private International Law that no British Court will entertain a suit affecting immoveable property in a foreign country, nor will a foreign judgment adjudicating on the title to immoveable property within British jurisdiction receive recognition in a British Court . The decisions of the highest Courts are unanimous "

Confronted with what certainly appears to be an insuperable obstacle in his way, the learned counsel for the appellant had to concede that the appellant could not pray for the relief of partition *in specie* of the immoveable properties in Ceylon. He also conceded that the Court could not adjudicate on the title to the immoveable properties, or direct delivery of possession of such properties situate in Ceylon He however contended that there were exceptions to the general rule which, if applied, would entitle him to a declaration of the appellant's rights in and to these properties and to an adjustment or working out of equities between him and the first defendant He relied on passages from well-known text-writers and decisions of English Courts, which according to him supported his contention. At page 207 of Dicey's " Conflict of Laws ", 5th edition, the exception is stated thus :

"Where the Court has jurisdiction to entertain an action against a person under either rule 59 or under any of the exceptions to rule 60, the Court has jurisdiction to entertain an action against such person respecting an immoveable situate out of England (foreign land) on the ground of either (*a*) a contract between the parties to the action, or (*b*) an equity between such parties with reference to such immoveable "

Rule 59 deals with actions *in personam* when the defendant is in England. The exceptions to rule 60 are not now relevant. In Westlake's " Private International Law ", the following passage was relied on :

"A proprietor of foreign immoveables or person interested in such, may be compelled by the English Court, if it has personal jurisdiction over him, to dispose of his property or interest in them so as to give effect to any obligation relating to them which arises from, or as from, his own contract or tort "

An examination of the decisions cited by the appellant's counsel, which will be dealt with in detail later on and the opinions of well-known writers on the subject leads us to a conclusion, which may be best stated in the language of Article 270 in Volume IV, Halsbury's Laws of England, 2nd edition .

"The English Courts have power to exercise a jurisdiction *in personam* in respect of foreign immoveables against persons locally within their jurisdiction in cases where there is an equity between the parties arising from contract, fraud or trust, provided that the decision of title be not directly involved "

In the words of Selborne, L.J

"The Courts of Equity in England are, and always have been, Courts of conscience, operating *in personam* and not *in rem*, and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction " (*Ewing* v *Orr Ewing*[1].)

In *British South Africa Co.* v *De Beers Consolidated Mines, Ltd*[2] the subject-matter was an English contract to give a mortgage on foreign land The question arose whether a clause in the mortgage was invalid, as being a clog on the equity of redemption It was urged that the " doctrine of clog " is a doctrine peculiar to English law and is not to be found in the Roman Dutch law, by which it was urged the rights of the defendants are to be governed, as the property was situate in Rhodesia in British South Africa It was held that the equitable rule against clogging the equity of redemption of a mortgage applies to an English contract for an issue of debentures to secure a loan and will be enforced against a contracting party in the jurisdiction, although the floating security to be created by the debentures

1 (1883) 9 A C 34 at 40. 2 (1910) 2 Ch 502.

comprised foreign land where the clog doctrine is possibly not recognised Dealing with this question Cozens Hardey, M R, says at page 513

"In my opinion the contract did not create any more than a personal right, as distinct from a real right, a right which the Courts of this country would enforce *in personam* For centuries the Court of Chancery has by virtue of its jurisdiction *in personam* applied against parties to a contract or trust relating to foreign land the principles of English law, although the *lex situs* did not recognise such principles"

The actual decision is to be found at page 515.

"In my opinion, an English contract to give a mortgage on foreign land, although the mortgage has to be perfected according to the *lex situs*, is a contract to give a mortgage, which *interpartes* is to be treated as an English mortgage and subject to such rights of redemption and such equities as the law of England regards as necessarily incident to a mortgage"

It is clear that this case proceeded on the basis of a dispute as regards a contract between the parties entered into in England In re *Smith: Lawrence* v. *Kitson*[1], in which the decision in *British South Africa Co* v *De Beers Consolidated Mines, Ltd*[2], was followed is again a case in which the contract was to have a legal mortgage of foreign land executed in favour of the plaintiffs in that suit It was really in the nature of a suit for specific performance of a contract The only complication in that case was that the person, who had agreed to execute the mortgage, had died before the institution of the suit leaving a will The properties were situated in the island of Dominica, West Indies and by the law applicable to immoveables in that country, an equitable charge was not sufficient to create a valid encumbrance upon property. Eve, J, held that the death of one of the parties to the contract cannot operate to change the law by which the contract was to be construed and prejudice the right of the other party to have specific performance of the contract. The case of *Arglasse* v *Muschamp*[3], decided in 1682 and the case of *Cranstown (Lord)* v *Johnston*[4], decided in 1796 are cases in which the Court of Equity in England relieved parties against the fraud played on them by the defendants who were also residents in England, though the fraudulent transactions related to immoveable property outside England In *Arglasse* v *Muschamp*[3], a fraudulent conveyance had been obtained by the defendant from the plaintiff in London, that is to say, the fraud was committed in London The property lay in Ireland In the other case *Cranstown (Lord)* v *Johnston*[4], there was an award made in England that the plaintiff should pay to the defendant upon a particular date a certain sum of money at the Lloyds Coffee House The plaintiff did not pay, as he was then abroad. After returning to England, there was a correspondence between the parties the object of which was to see that the amount due to the defendant was properly secured Meanwhile, however, behind the back of the plaintiff, the defendant took proceedings in the Courts of St. Christophers, an island in the West Indies, and, without even service of process on the plaintiff, procured an absolute sale of the plaintiff's interest in property situate there The plaintiff, after he came to know of the fraud played upon him by the defendant, brought a suit offering to pay the balance due to the defendant and to have the sale procured by the defendant cancelled Evidence was also tendered in the case that at the time when the defendant was taking proceedings to obtain an outright sale of the plaintiff's property in St Christophers, he declared to one Lord Kinnair that he was only taking proceedings to obtain security for his demand An objection as to jurisdiction was taken, but was overruled by the Master of the Rolls The following passage in the judgment of the Master of Rolls clearly shows the nature and extent of the jurisdiction, which Courts of Equity in England exercised in respect of foreign immoveable property when gross fraud had been perpetrated by parties resident in England and amenable to their jurisdiction

"Those cases clearly show that with regard to any contract made, or equity, between persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England . Therefore, without affecting the jurisdiction of the Courts there, or questioning the regularity of the proceedings as in a

1 (1916) 2 Ch 206.
2 (1910) 2 Ch. 502.
3 (1682) 1 Vern 76 23 E R. 322
4 (1796) 3 Ves. Jun 169: 30 E.R. 952.

Court of law, or saying that this sale would have been set aside either in law or equity there, I have no difficulty in saying, which is all I have to say, that this creditor has availed himself of the advantage he got by the nature of those laws to proceed behind the back of the debtor upon a constructive notice . that he gained an advantage which neither the law of this, nor of any other country would permit I will lay down the rule as broad as this This Court will not permit him to avail himself of the law of any other country to do what would be gross injustice . . I have no scruple to say in this case it would be unconscionable to permit the defendant to avail himself of the laws of this island to procure this state for any other purpose than to pay him his own debt "

He therefore ordered that on payment of the balance due to the defendant, he should reconvey the property purchased by him to the plaintiff

In In re *Clinton* : *Clinton* v. *Clinton*[1] and in *Hope* v *Carnegie*[2], the actions were for administration of a testator's real and personal estates. In both the cases, there was a trust, the defendants were trustees and the equities had to be worked out. They were cases in which personality and reality were so mixed up that reality could not be dealt with apart from the personalty In both the cases the decision of the Court was pronounced at a very early stage of the proceedings and did not purport to lay down any general rule of law. Actually in *Hope* v *Carnegie*[2], Knight Bruce, L J and Turner, L J , differed as to the proper order to be passed in the case.

It will be seen that in every one of these cases the question was one of either " fraud, trust, or contract," to use the words of Marshall, C J In the present case, admittedly, there is no contract ; there is no suggestion of fraud. It was faintly suggested that there was a trust, because the first defendant was the manager of the family from 1932 and his possession was to an extent fiduciary in relation to the plaintiff, and, therefore, there was ground for the exercise of extraordinary jurisdiction *in personam* The appellant's argument on this part of the case rests almost entirely on a stray sentence from the judgment of the Judicial Committee in *Annamalai Chettiar* v *Murugesa Chetti*[3], Lord Lindley, delivering the judgment of the Judicial Committee, overruled a contention of the appellant in that case that the manager of the joint family property should be held to be the agent of the members of the family and said

" 'Kandaswami Chetti's acts and his payments to the defendants are all attributable to his being the manager of joint family property, of which the defendant had a share , and their Lordships entirely concur with the High Court in holding that such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager The relation of such persons is not that of principal or agent, or of partners , it is much more like that of trustee and *cestui que trust* "

From this passage the appellant is not justified in advancing an argument that in a suit for partition the Court is called upon to enforce a trust It has been held over and over again that the manager of a Hindu joint family is not under any of the well known obligations of a trustee with regard to the administration of the funds of the family

Equally unsound is the appellant's contention that the suit need not be regarded as relating to immoveable properties in Ceylon, because such properties are part of the assets of a partnership , and what the Court is called upon to do is, so to say, to order a winding up of the partnership and distribution of the surplus assets. The argument is sought to be developed by reliance on cases decided in England in which questions as to liability to legacy duties arose for decision and immoveable partnership property had been held to be in the nature of personalty.

Two propositions may be taken as well established

1. The share of a partner is his proportion of the general assets after their realisation and conversion into money and after demand and discharge of the joint debts and liabilities It is true that when part of the assets of a partnership is in the shape of immoveable property, each partner is not entitled to a partition

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1. 88 L T. 17
2 (1866) 1 Ch A. 320
3 (1903) 13 M L.J 287 · L R 30 I.A. 220 I L R. 26 Mad. 544 at 553 (P.C).

in specie of such property. On a dissolution, the property along with other assets will have to be converted into money and all debts and liabilities should be discharged and it is in the surplus that the partners have a right to share

2. In England, real estate bought or acquired by a partnership for partnership purposes is as between the partners and as between the real and personal representatives of a partner deceased, personal property and devolves and is distributable and applicable as personal estate Authority is to be found for this in the elaborate and exhaustive judgment of Kindersley, Vice-Chancellor in *Darby* v *Darby*[1], in which occurs the following oft-quoted passage

"Now it appears to me that irrespective of authority and looking at the matter with reference to the principle well established in this Court, if partners purchase land merely for the purpose of their trade and pay for it out of the partnership property, that transaction makes the property personalty and effect a conversion out and out What is the clear principle of this Court as to the law of partnership ? It is that on the dissolution of the partnership, all the property belonging to the partnership shall be sold and the proceeds of the sale after discharging of the partnership debts and liabilities shall be divided among the partners according to their respective shares in the capital " (Vide Re *Stokes Stokes* v *Ducroz*[2], *Forbes* v *Stevens Mackenzie* v *Forbes*[3])

All this is true, but there are two insuperable difficulties in the way of this contention succeeding Firstly, a Hindu joint family carrying on business is not a partnership and this aspect has already been dealt with earlier on. Secondly, what may be personalty in England may also comprise immoveable property, with the result that legacy duty will be payable in respect of certain property as personalty, though for the purpose of adjudicating on title, such property may be undoubtedly immoveable property It follows that the rulings in *Durga Das* v. *Jai Narain*[4] and *Ismail Ji* v. *Ismail Abdul*[5], which dealt with suits for dissolution of partnership have absolutely no bearing upon the point arising in this case

Finally Mr. Ramaswami Aiyar argued that even if the Court would not decree partition of immoveable property outside British India, it may nevertheless take such property into its calculation in adjusting the equities between the parties. Such a contention was negatived as early as 1893 in *Ramacharya* v. *Anantacharya*[6]. In the words of Telang, J , doing this would be " doing indirectly that which the law says may not be done directly " In *Subbayya Mudaliar* v *Thulasi Mudaliar*[7], there was a difference of opinion between Spencer, J and Sadasiva Aiyar, J , whether property in foreign territory belonging to the family could be taken into account in a suit for partition filed in British India It is not necessary to go into this question, because the opinion is practically unanimous that in a case where there is a dispute as to title to immoveable property in foreign territory, a British Indian Court will have no jurisdiction to adjudicate with regard to it. It is not also necessary to refer to cases cited on behalf of the appellant in which reliefs purely *in personam* were awarded in respect of the income of property outside British India, but received by a defendant within British India, because they are all cases where there was no dispute as to the title to the foreign property in question.

We therefore agree with the learned Subordinate Judge that he had no jurisdiction to decree a division of immoveable properties in Ceylon, or even to declare that the properties in dispute between the plaintiff and the first defendant are partible joint family properties

This finding is sufficient to dispose of the appeal , but as the learned Subordinate Judge has given his findings on the other issues dealing with the merits of the case set up by either party and as this litigation may not stop here, we shall proceed to briefly indicate our view on the several questions argued before us At the outset we are faced with this difficulty Almost every one of the issues, other than issues relating to jurisdiction, relates to immoveable properties in Ceylon Issues 1, 2, 3, 5, 6 and 7 are concerned with the question of the validity of the conveyances

1. (1856) 3 Drew 495, 503.
2. (1890) 62 L T 176
3. (1870) L R 10 Eq Cases 178
4. (1917) I.L R 41 All. 513
5. (1921) I L R 45 Bom. 1228.
6. (1893) I.L R 18 Bom 389
7. (1913) 1 L W. 65

executed in September, 1926, in favour of the first defendant alone (Exs D 29-a and D 29-b). Undoubtedly the law to be applied in determining the rights of parties to these properties is the law prevailing in Ceylon. In the words of Dicey :

"The well-established rule is that all rights over and in relation to an immoveable (land) are, subject to certain exceptions, governed by the law of the country where the immoveable is situate (*lex situs*) "

Hence a person's capacity to alienate an immoveable by sale or mortgage *inter vivos* or to devise an immoveable, or to acquire, or to succeed to an immoveable is governed by the *lex situs* (Dicey pages 585 and 586) The following passage from Story's " Conflict of Laws " is very apposite in this connection

"If a person is incapable from any . circumstance of transferring his immoveable property by the law of *situs*, his transfer is held invalid, although by the law of his domicile no such personal incapacity exists On the other hand, if he has capacity to transfer by the law of the *situs*, he may make a valid title, notwithstanding an incapacity may attach to him by the law of his domicile This is the silent, but irresistible result of the principle adopted by the common law, which has not admitted exception "

Issue (4) runs thus :

" What is the law governing the parties with reference to the immoveable properties in Ceylon ?"

In regard to this issue the position is summarised by the Subordinate Judge in paragraph 41 of his judgment There is really no evidence as to what the law in Ceylon is in regard to immoveable properties. This fact would naturally render any findings that we may arrive at absolutely of no use They, of course, will not have the force of a binding adjudication in Ceylon.

Applying the law which would govern the parties if the immoveable properties were situate in British India, we have no hesitation in finding that the father Annamalai had no power to dispose by will of any of the properties of the joint family Likewise, he could not alienate by way of sale or gift the properties covered by Exs. D 29-a and D 29-b, in favour of the first defendant alone The position does not admit of any doubt The properties were admittedly acquired with the profits of the money-lending business in Puttalam, or formed part of its assets The money-lending business itself has been found to be the family business It is on this finding that a decree has been given in favour of the plaintiff for his share in its assets excluding, of course, the immoveable properties and their income , and the first defendant has not challenged that finding before us It follows that the properties would belong to the joint family The manager of a joint family and even a father cannot dispose of family property by will, or by settlement, or by gift. He may undoubtedly sell family property for necessity and a father can alienate to discharge an antecedent debt But the first defendant in this case does not seek to justify the transfers in his favour on any of these grounds The allotment of an extra share in favour of the eldest son, what is known as *jesthabagam*, has become obsolete and unenforceable All these propositions were not seriously challenged by the advocate for the first respondent. We therefore agree with the learned Subordinate Judge, that the documents Exs D 29-a and D 29-b could not validly convey the exclusive title to the properties mentioned therein to the first defendant and notwithstanding them the properties would continue to be joint family properties liable to be divided between the brothers

The advocate for the appellant raised a further contention that the power of attorney in favour of Lakshmanan Chettiar who executed Ex. D 29-a on behalf of Annamalai, did not confer on him a power to execute a deed of gift or settlement in favour of one of the sons alone According to him, Ex D 29-a, though called a deed of sale, is in reality a deed of gift or settlement. In the power of attorney, Ex D-2 there are only two clauses which have any relevancy They are clauses 9 and 13. They run as follows .

Clause 9 "To sell to any person all or any of my lands, leases and charges, whether now belonging to me or which shall belong to me and for that purpose to sign, and execute all transfers and other instruments necessary.

Clause 13 "To execute a deed of gift of the properties I possess in Puttalam in favour of my sons, Muthukaruppan and Nachiappan "

Clause 13 obviously cannot apply, because Ex. D 29-a is in favour of the first defendant only and not in favour of both the sons If Ex D 29-a were in reality a sale, then undoubtedly clause (9) would be sufficient to confer the requisite authority on the agent to execute it But it is contended that the consideration for Ex D 29-a is recited therein as a portion of the sum which Annamalai agreed to pay to the first defendant at the time of his (Annamalai's) marrying a second time. Even assuming that there was an enforceable promise by Annamalai—and that was the consideration—it will be doubtful if the transaction could be called a sale when the transfer is not for a price We do not desire to pronounce an opinion on this question because, even assuming that this document, Ex D 29-a, was validly executed it could not, according to the law obtaining in British India, convey a valid title, to the first defendant of what must be deemed to be joint family property.

It was mentioned at the beginning that the first defendant strongly relied upon the muchilika dated 1st May, 1940, to which the plaintiff was also a party The plaintiff, apart from denying its legal effects as contended for by the first defendant, seeks to get rid of it by pleading that its execution is vitiated by the exercise of undue influence by the first defendant on him The plaintiff's case on this point is very vague and the evidence extremely meagre So far as we understand it, the plaintiff's case is that his marriage with the daughter of a rich Chettiar in Kandanoor was being negotiated at that time, but the first defendant threatened not to take any part in the marriage, or to expend monies for it, unless the plaintiff agreed to a division and unless he signed the document in question, that the first defendant had the purse with him and that he was a young boy and he did not want to have his marriage broken off, and so persuaded by his mother, he had no other alternative but to sign the muchilika We consider that the plea of undue influence is entirely without substance This is what the plaintiff himself says in his evidence :

"After my marriage was settled, defendant 1 objected to give me money for the marriage and for the performance of the marriage in the family house and so my mother advised me to sign in the agreement to get over the objections. As Narayana Chettiar (the bride's father) was a respectable man, I was afraid that the marriage might be cancelled if he came to know of the differences between me and defendant 1 So I signed in Ex D-11 "

In cross-examination he says

"Defendant 1 told me that unless I signed in the original of Ex D-1 he could not spend money for the marriage "

So, apparently, the first defendant wanted to have a division effected and the expenses of the plaintiff's marriage met from the plaintiff's share In his evidence the first defendant says

" I told my step-mother that plaintiff had become a major, and he can have the properties divided and attend to the expenses himself "

It is impossible to find evidence of any circumstances, which can lead to an inference of undue influence It cannot be said that the first defendant was in a position to dominate the will of the plaintiff The plaintiff had his mother and his maternal relations and their advice It is not even suggested that he was prevented from having any legal advice He was about 20 at the time, but in the community to which he belongs, it is an age when the plaintiff can be expected to have good knowledge of the affairs of the world, particularly of matters relating to money and property. We have no hesitation in holding that the muchilika (Ex D-11) was not executed by the exercise of undue influence by the first defendant on the plaintiff At the same time, we are not disposed to attach very much importance to this document as shutting out the plaintiff from putting forward such rights as he may have in law The only words that could possibly be pressed into the service of the first defendant are the words " in pursuance of the will executed by our father " Now, it is a far cry from these words to what the first defendant would say they imply, *viz*, " accepting the validity of the documents dated 2nd September 1926, in favour of the first defendant." The document says nothing of the sort. The plaintiff does not say that he will be bound by the deed of sale and the deed of transfer of leasehold in favour of the first defendant. No doubt there is mention of the will ; but that leads the first defendant nowhere, for he is not clai-

ning any right in this suit under that will The will did not bequeath any specific properties to the first defendant and it may be stated, in one sense, there was nothing on which the will could operate, so far as the property in Ceylon were concerned.

It is clear that there could be no estoppel against the plaintiff on account of this document It has not been suggested that acting on the faith of this, the first defendant changed his position or did any act, or suffered any detriment and therefore the plaintiff is prevented from going behind it The only detriment suggested, *viz* , that the first defendant took part in the marriage, is, to say the least, fanciful. The advocate for the first defendant tried to say that the document is evidence of an assent or an acceptance on the part of the plaintiff, but was unable to maintain that it could fall within any of the known legal positions of election, or ratification, or the doctrine of approbate and reprobate. It has been held that even an admission made under a wrong impression of the law will not bind a party (vide *Sankaran Nambi* v *Nangeeli Amma*[1]). Cases in which Courts have upheld transactions acted upon for a number of years, invalid though they may be, are entirely irrelevant. (*Bijraj Singh* v *Sheodhan Singh*[2] and *Subbarao* v *Subbarao*[3])

We therefore do not agree with the learned Subordinate Judge that the two deeds of conveyance in favour of the first defendant (Exs D 29-a and D 29-b) are valid and binding on the plaintiff because of his execution of the muchilika (Ex. D-11).

Though, therefore, we should, if the question were to be decided according to the law of India, be inclined to hold in favour of the plaintiff with regard to his claim for a partition of the immoveable properties covered by Exs D 29-a and D 29-b, still in accordance with our finding that a British Indian Court cannot have jurisdiction to entertain a suit for partition of immoveable property outside British India, the plaintiff cannot be given any relief in this suit in respect of them The appeal which is really confined to these properties, fails and is dismissed with costs of the first respondent

There is a memorandum of cross-objections filed on behalf of defendants 5 and 6, the mother and sister respectively of the plaintiff In their joint written statement they made the following claims (1) for maintenance of the fifth defendant; (2) for the residence of the fifth defendant , (3) for an account from the first defendant of the stridhanam and other monies belonging to the fifth defendant entrusted with her husband for investment in the business , and (4) for the marriage and other expenses of the sixth defendant, the daughter The issues relating to these claims are issues 12, 12 (*a*), 12 (*b*), 12 (*c*), 12 (*d*), and 13 The learned Subordinate Judge gave a finding only on issue 12 (*d*) He held that the fifth defendant was not entitled to any separate residence and if any separate residence were necessary, it shall be allotted in the plaintiff's half share of the family house and the actual allotment was reserved to be fixed by the Commissioner The fifth defendant will no doubt have a right to reside in the family house, but it is extremely unlikely that she would reside anywhere except with her son, the plaintiff We do not think it necessary to interfere with the finding of the Subordinate Judge in this matter

Issues 12, 12 (*a*), 12 (*b*), 12 (*c*), and 13 were not decided by the Judge. He considered that these issues had got to be dealt with only after the Commissioner had taken an account and determined the assets and liabilities of the family. They were, therefore, reserved for being dealt with after the return of the Commissioner's report Ordinarily it is the practice to provide for the maintenance of widows and marriage expenses of unmarried girls in the family in the preliminary decree itself, but we do not think that the rights of the fifth and sixth defendants have been injured by such a reservation Their advocate, however, rightly complains that the reservation made in the judgment has not been properly incorporated in the decree. Clause (7) of the decree as drafted is certainly incomplete and inadequate We direct that it be modified in accordance with the reservation made in paragraph 51 of the learned Judge's judgment

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1 (1935) 70 M L J 592 I L R 35 All 337 (P C)
2. (1913) 25 M L J 188 L R 40 I A 161 3 (1936) 71 M L J 419.

There was also justification for their complaint that issues 12 (*a*) and 12 (*b*) should have been decided. But, before us, on behalf of the first defendant, his Counsel does not object to the Commissioner, who has been appointed to take an account of the business also ascertaining the amount due to the fifth defendant in respect of the amounts belonging to her and invested in the business.

The first defendant does not also now dispute the rights of the fifth defendant to a share of the *thottam* at Puttalam and his admission is recorded The memorandum of objections will otherwise stand dismissed. No order as to costs

K. S. *Appeal dismissea and memorandum of appeal allowed in part*

[THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ

Ex-Rana Birpal Singh of Bhajji State .. *Appellant**

v.

The King Emperor . *Respondent.*

Criminal Procedure Code (V of 1898), section 491—Jurisdiction to act under in case of detention under the Bengal State Prisoners Regulation (III of 1818)—Detention under the Regulation of deposed ruler of a Native State—Remedy of detenue

B, who had been for some time the Rana of the State of Bhajji and duly recognised as the ruler thereof was deposed on the 8th September, 1940, and was by a warrant dated 9th September, 1940, issued under the Bengal State Prisoners Regulation (III of 1818) directed to be detained and was so detained On an application on the detenue's behalf for directions in the nature of *habeas corpus* under section 491, Criminal Procedure Code,

Held Once the Court is satisfied that a person is being detained under Regulation (III of 1818), there is no jurisdiction under section 491, Criminal Procedure Code, which the Court can exercise in the matter. The jurisdiction under section 491 is wholly statutory and governed by the terms of the section Moreover the very basis of jurisdiction under sub-section (1) (*b*) of section 491 is expressed to be "illegal or improper detention in public or private custody", but by virtue of sub-section (3) in cases of persons detained under Regulation (III of 1818), sub-section (1) (*b*) has no application It therefore follows that something more than allegations that a person is being "illegally or improperly" detained under Regulation III is necessary before the Court can get over the bar to jurisdiction under the section imposed by sub-section (3) Complaints as to the illegality or impropriety of the detention, if the detention be under Regulation III, can be dealt with under the procedure laid down in sections 3, 4 and 5 of Regulation III and may well be the basis of other claims which a Court can properly entertain, but such allegations cannot be sufficient to give the Court jurisdiction under section 491 The only ground which could possibly enable the Court to exercise jurisdiction under section 491 in such a matter would be that in fact the detenue was a person to whom Regulation III did not and could not apply

Neither on the date of his detention, nor at any date since, has the detenue had the status of a ruler of a State and he was subject to and has since that date been a person detained under Regulation III Therefore there is no jurisdiction under section 491 of the Criminal Procedure Code which the Court can exercise in this case.

K. L. Gauba, Advocate, Federal Court, instructed by *Ram Krishna Kuba*, Agent, for Appellant

Sir Noshirvan Engineer, Advocate-General of India (*Mohammad Sadiq*, Advocate, Federal Court, with him), instructed by *K Y. Bhandarkar*, Agent, for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—Prior to the 8th September, 1940, the appellant in this case, Birpal Singh, had been for some time the Rana of the State of Bhajji, one of the Simla Hill States, and duly recognised as the ruler thereof. On the 8th September, 1940, he was brought to Simla and was lodged in the Ripon Hospital there. On the 9th September, 1940, a warrant addressed to the Deputy Commis-

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* Criminal Appeal No. II of 1945. 31st January, 1946.

sioner, Simla, was issued under the provisions of the Bengal State Prisoners Regulation, 1818, in the following terms :—

"Whereas the Governor-General in Council for good and sufficient reasons, being reasons connected with the discharge of the functions of the Crown in its relations with Indian States, has seen fit to determine that Birpal Singh, ex-Rana of Bhajji, shall be placed under personal restraint at Simla, you are hereby required and commanded in pursuance of that determination to receive the person abovenamed into your custody and to deal with him in accordance with the orders of the Government and provisions of the Bengal State Prisoners Regulation, 1818

By order of the Governor-General in Council (Sd) R TOTTENHAM,

Additional Secretary to the Government of India."

In pursuance of this warrant, the appellant continued to be lodged in the said Ripon Hospital There, on the 21st day of September, 1940, he was personally examined by Lieutenant Colonel A. Sargood Fry, I M S, Civil Surgeon, Simla East, who forthwith issued a certificate that the appellant was "a lunatic and proper person to be taken charge of and detained under care and treatment" It is not without importance to notice that Colonel Fry's certificate on the face of it refers to sections 18 and 19 of the Indian Lunacy Act (IV of 1912), and is obviously in the form prescribed by that Act Some time seems to have elapsed before any action was taken on this certificate On the 11th April, 1941, a second warrant was issued under the provisions of the Bengal State Prisoners Regulation, 1818, addressed to the Superintendent of the Indian Mental Hospital at Lahore in the following terms :

"Whereas the Governor-General in Council for good and sufficient reasons, being reasons connected with the discharge of the functions of the Crown in its relations with Indian States has seen fit to determine that Birpal Singh, ex-Rana of Bhajji shall be placed under personal restraint at the Indian Mental Hospital at Lahore, you are hereby required and commanded, in pursuance of that determination, to receive the person abovenamed into your custody and to deal with him in accordance with the orders of the Government and the provisions of the Bengal State Prisoners Regulation of 1818"

The warrant was expressed to be "By order of the Governor-General in Council" and was signed by an Additional Secretary to the Government of India in the Home Department In pursuance of this warrant, the appellant was removed from Simla and lodged in the said Mental Hospital at Lahore, and there he has been detained ever since

It would appear that shortly after the issue of the warrant of the 11th April, 1941, some doubts were felt by the issuing authority as to the validity of such a warrant, particularly as to whether it constituted a proper authority to the Medical Superintendent or other responsible official in charge of a Mental Hospital, for the reception and detention of the appellant and others, if any others there were in *simili casu*, having regard to the provisions of section 4 and other provisions of the Indian Lunacy Act, 1912 Accordingly, on the 26th June, 1941, an Ordinance (No. V of 1941) was made and promulgated by His Excellency the Governor-General in the following terms —

"THE STATE PRISONERS (DETENTION OF LUNATICS) ORDINANCE, 1941

(ORDINANCE No V of 1941)

[26*th June*, 1941.

An Ordinance to authorise the reception and detention in an asylum of individuals committed by warrants issued under the Bengal State Prisoners Regulations, 1818, to detention in that asylum

WHEREAS an emergency has arisen which makes it necessary to authorise the reception and detention in an asylum of individuals committed by warrants issued under the Bengal State Prisoners Regulation, 1818 (Bengal Regulation III of 1818), to detention in that asylum ,

Now, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance —

Short title, extent and commencement

1 (1) This Ordinance may be called THE STATE PRISONERS (DETENTION OF LUNATICS) ORDINANCE, 1941

(2) It extends to the whole of British India

(3) It shall come into force at once.

2. Notwithstanding anything contained in the Indian Lunacy Act, 1912, a warrant of commitment issued under section 2 of the Bengal State Prisoners Regulation, 1818 (Bengal Regulation III of 1818), directing the detention in an asylum of an individual placed under personal restraint in pursuance of that section, who is, in the opinion of the authority issuing that warrant, insane, shall be and shall be deemed to have been from the time such warrant was issued sufficient authority for the reception and detention of that individual in that asylum or in any other asylum to which he may be lawfully transferred."

Power to receive and detain in asylum persons restrained under Regulation III of 1818

For some considerable time thereafter no legal action was taken by or on behalf of the appellant On the 10th December, 1943, however, one Dr P. N Seth of Lahore, as next friend of the appellant, made an application for directions in the nature of *habeas corpus* under sections 491 and 561-A of the Code of Criminal Procedure in the matter of the detention of the appellant These proceedings are reported in *Gurdas Mal-Ram Chand v Khemchand Prem Singh*[1]. Eventually, on the 7th June, 1944, after various questions had been referred to and decided by a Full Bench, the application was dismissed. A certificate under section 205 of the Government of India Act, 1935, having been granted by the Full Bench, Dr Seth filed a belated petition of appeal in this Court which on the 12th December, 1944, was dismissed on account of the undue delay in filing the petition.

Meantime, on the 7th, 12th and 27th October, 1944, the appellant personally wrote and addressed a series of communications to the Chief Justice of the High Court at Lahore, which were duly forwarded through the Medical Superintendent of the Mental Hospital in which the appellant was detained These somewhat confused communications, the learned Chief Justice decided should be treated as further applications by the appellant under section 491 of the Code of Criminal Procedure, and they were referred to a Division Bench (Abdur Rahman and Munir, JJ.), for disposal At a preliminary hearing on the 26th January, 1945, the Division Bench directed that Mr Gauba, who appeared for the appellant, should put into more formal shape the points which he desired to argue and give notice of them to the Crown and adjourned the applications. This having been done and points of reply put in on behalf of the Crown, the applications were heard on the 4th and 5th June, 1945, and judgment was delivered dismissing the applications on the 12th June, 1945 On the 22nd June, 1945, a certificate was granted to the appellant under section 205 of the Government of India Act, 1935 On the 9th August, 1945, this petition of appeal was filed in this Court during the vacation On the 5th October, 1945, the appellant filed an application under Order 40, rules 1, 3 and 5 of the Federal Court Rules, and section 151 of the Code of Civil Procedure, praying that the delay if any, in filing the appeal might be condoned That application the Court ordered to be put down for hearing with the petition of appeal in this case On the 21st November, 1945, at the request of the appellant, the Court made an order that the appellant should be produced at the hearing of the appeal to appear and plead in person. The appellant was so produced, but upon the appeal being called on for hearing, Mr. Gauba appeared on behalf of the appellant.

The first matter raised was whether or not, having regard to the provisions of Order 17, rules 1 and 2, and Order 2, rule 3 of the Federal Court Rules, the petition of appeal had been presented in due time It was urged by the Advocate-General of India that the order appealed against must be taken to have been made in the exercise of the criminal jurisdiction of the Lahore High Court, and that accordingly the thirty days period prescribed by Order 17, rule 1 applied He further contended that this Court was not " closed " within the meaning of section 4 of the Indian Limitation Act, 1908, during vacation, since in compliance with Order 2 rule 3, the offices of the Court were open during the vacation At the same time the Advocate-General admitted that even if he succeeded in all his contentions, the Court could still in the exercise of its discretion condone the delay, if any The Court accordingly, without a full discussion and without deciding whether the

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1. (1931) I L R 13 Lah 31 *et seq*

order had been made in the exercise of the criminal jurisdiction of the Lahore High Court or whether the Court was or was not "closed" during the material period, decided to hear the appeal on its merits.

On being asked to indicate the points which he wished to argue, including the constitutional points in respect of which the certificate under section 205 of the Government of India Act, 1935, had been granted, Mr. Gauba stated that he desired to submit (*a*) that the appellant was still *de jure* the ruler of Bhajji State, and as such not within the category of persons in respect of whom any warrant of commitment could be issued under the Bengal State Prisoners Regulation (III of 1818), (hereafter referred to as "Regulation III"), (*b*) that Ordinance V of 1941 was *ultra vires* the ordinance-making powers conferred on the Governor-General by section 72 of the Ninth Schedule to the Government of India Act, 1935, and (*c*) that in any event the conditions of sub-clause (2) of the Ordinance had not been carried out, as no further warrant had been issued after the promulgation of the Ordinance and there was no evidence or not sufficient evidence that the issuing authority of the previous warrants ever held the opinion that the appellant was insane At one stage Mr. Gauba also urged that the form of the warrant of the 11th April, 1941, did not on the face of it sufficiently indicate that it was a warrant isued by the Central Government as required by section 7-A of Regulation III, and that positive evidence that the matter had been considered and orders given for its issue by the appropriate officials was required before a Court could hold the warrant a valid warrant under Regulation III

In spite of the fact that section 491 of the Code of Criminal Procedure, on which the appellant's application to the Court was founded, contains in sub-section (3) thereof the provision "Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818," we thought it desirable that Mr. Gauba should be permitted to argue all his points It is however in our judgment clear that once the Court is satisfied that a person is being detained under Regulation III, there is no jurisdiction under section 491 which the Court can exercise in the matter And throughout there has been no suggestion that there is any other jurisdiction which could be exercised by the Court in these proceedings. Accordingly, in our judgment, the material question in this case is Is the appellant a person detained under Regulation III? If he is, this application must fail. The jurisdiction under section 491 is wholly statutory and governed by the terms of the section Moreover, it must be appreciated that the very basis of jurisdiction under sub-section (1) (*b*) of section 491, which is the only sub-section under which the Court could be asked to assist the appellant in this case, is expressed to be "illegal or improper detention in public or private custody", and yet by virtue of sub-section (3) in cases of persons detained under Regulation III, sub-section (1) (*b*) has no application It seems to us therefore to follow that something more than allegations that a person is being "illegally or improperly" detained under Regulation III is necessary before the Court can get over the bar to jurisdiction under the section imposed by sub-section (3) Complaints as to the illegality or impropriety of the detention, if the detention be under Regulation III, can be dealt with under the procedure laid down in sections 3, 4 and 5 of Regulation III and may well be the basis of other claims which a Court can properly entertain, but such allegations cannot in our judgment be sufficient to give the Court jurisdiction under section 491 If on the facts of the case it is clear that a person is being detained under Regulation III, even though a Court might think if it investigated those facts, it might find that the detention was illegal or improper, still the Court cannot in our judgment interfere under section 491 In this case it is clear that the Government has been claiming to detain the appellant from the 9th September, 1940, onwards under Regulation III

Only one point therefore raised on behalf of the appellant in this case could in our judgment possibly have enabled the Court to exercise jurisdiction under

section 491, and that was if in fact the appellant is a person to whom Regulation III does not or cannot apply at all. Then it might perhaps be possible to hold that there was no detention at all (legal or illegal, proper or improper) under Regulation III. It seemed therefore to us that if the appellant still had the status of ruler of Bhajji State, it might be that he was a person to whom Regulation III had no application whatsoever. After hearing Mr. Gauba fully on this point and the reply of the Advocate-General, and perusing a certificate, dated the 4th May, 1945, signed by the Secretary to His Excellency the Crown Representative which we permitted the Advocate-General to put upon the record, we are satisfied that neither on the 9th September, 1940, nor at any date since, has the appellant had the status of a ruler of a State. The certificate referred to is in the following terms :

"In the discharge of the functions of the Crown in its relations with the Indian States His Excellency the Crown Representative, on behalf of His Majesty, ceased to recognise Birpal Singh on and from the 8th September, 1940, as the ruler of the State of Bhajji, and from that date Ram Chunder Pal Singh, son of Birpal Singh, was recognised by His Excellency the Crown Representative on behalf of His Majesty as the Ruler of that State Neither on the 9th September, 1940, nor on any subsequent date was Birpal Singh recognised by or on behalf of His Majesty as the Ruler of the State of Bhajji.

(Sd.) C L GRIFFIN,

Secretary to His Excellency the Crown Representative"

But in addition to this it is clear from statements made by the appellant himself in an affidavit made by him on the 10th February, 1944, in the earlier proceedings brought by Dr. Seth on his behalf, to which the Advocate-General invited our attention, that he admitted that he was deposed on the 8th September, 1940, and informed of the fact at the time The appellant has now and then suggested that his removal from the *gadi* was not legal or proper, but that is not a matter with which the Court can deal. In our judgment it is clear that on the 9th September 1940, he was subject to and has since been subject to the provisions of Regulation III, and was and has since the 9th September, 1940, been a person detained under Regulation III In our judgment therefore there is no jurisdiction under section 491 of the Code of Criminal Procedure which the Court can exercise in this case

We do not propose to go into the other questions raised and argued by Mr. Gauba At most they amount to allegations of illegal or improper detention under Regulation III which even if substantiated would not for the reasons earlier explained give the Court jurisdiction under section 491 But we would put on record that in no way could we have come to any different conclusions to those arrived at by the learned Judges of the High Court at Lahore

We would add that it is satisfactory that in a case such as this, the Government promptly adopted the suggestions made in the judgment of the High Court now under appeal and have had the appellant again examined by a Medical Board who submitted a report dated the 5th September last We appreciate its production by the Advocate-General to us. For the appellant's sake we regret that the conclusions were not more favourable But we are satisfied from this and the further statement of the Advocate-General made to us that all proper care and attention is being given and is intended to be given to the appellant

The appeal fails and is dismissed.

G R /V S. *Appeal dismissed.*

[THE FEDERAL COURT OF INDIA.]

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.

The Bank of Commerce, Ltd , Khulna .. *Appellant**

v

Protap Chandia Ghose and others .. *Respondents.*

and

In the matter of a petition by the appellant under Order XI read with Order XL of the Federal Court Rules, 1942, praying for amendment of the cause title of the above-mentioned appeal by incorporating the name of Srm Sushila Bala Ghosh in place of the deceased respondent Amal Krishna Ghose

Federal Court Rules (1942), *Order XV, rules* 6 *and* 7 *and Limitation Act* (*IX of* 1908)—*Section* 5—*Respondent to an appeal found to be dead on date when the appeal was filed—Application to enter name of his legal representative as respondent in the appeal—Maintainability—Sufficient cause for excusing delay.*

When it was discovered that one of the respondents to an appeal was dead even on the date of the filing of the appeal, an application was made to the Federal Court that the name of his legal representative may be entered as a respondent to the appeal in place of the deceased . On the objections by the legal representative that the application should on terms of Order XV, rule 6 of the Federal Court Rules have been filed in the High Court and not in the Federal Court and that there was no sufficient cause for the delay in taking the proper steps,

Held that the case did not fall within the first of the two categories contemplated by rule 6 of Order XV because the deceased person was not in the eye of the law a party to the appeal as originally preferred as he had died before the filing of the appeal The addition of the parties referred to in the rule cannot cover the representative of a party in whose favour a decree had been passed. Rule 7 also shows that the addition spoken of in rule 6 refers to an addition necessitated by a party already on the record "undergoing a change of status" Where the appeal has to be preferred for the first time against the heir of a person in whose favour the lower Court had passed a decree, the mere fact that an appeal had already been preferred as against other persons will not justify the application being treated merely as one to add a party Even if it be so in form, it is in substance an appeal preferred against him for the first time, and it is only on that footing that the question of the application of section 5 of the Limitation Act to such cases will arise

Held further, that in the circumstances the delay must be held to have been satisfactorily explained

P. C. Basu, Senior Advocate, Federal Court (*Sris Chandra Dutt*, Advocate, Federal Court, with him) instructed by *Ganpat Rai*, Agent for Petitioner

B Banerji and *P. Pal* Advocates, Federal Court, instructed by *P. K Bose*, Agent, for Respondent

The Court made the following

ORDER —This is an application by the appellant in Civil Appeal No. XVI of 1944 praying that the name of one Sushila Bala Ghosh may be entered as a respondent to this appeal in place of her son Amal Krishna Ghose (deceased). The appeal was filed on the 29th of September, 1944, and Amal Krishna Ghose was there shown as the 16th respondent ; but when notice of the appeal was attempted to be served on him, it was reported that he had died This report was communicated by the appellant's Agent at Delhi to the appellant Company in Calcutta by letter dated 19th January, 1945 On the 23rd of January, 1945, the Managing Director of the appellant Company wrote to Mr S C Dutt, the company's advocate at Calcutta, to "do the needful in the matter" and wrote to the Khulna branch of the Bank to make the necessary enquiries From a copy of a petition for substitution in Title Suit No 9 of 1942 which had been served on the law clerk of the company at Khulna on 18th December, 1944, it appeared that Amal Krishna Ghose had died on 23rd September, 1944 On being informed of this, the appellant's advocate at Calcutta filed a petition in the Calcutta High Court, under Order XV, rule 6 of the Federal Court Rules, 1942, praying that Sushila Bala Ghosh might be brought on the record as the legal representative of the deceased Amal Krishna. This petition was apparently prepared on the 5th of February, 1945, but filed in the Court on the 6th of February. By order dated 22nd March, 1945, the High Court

* *In the matter of* Civil Appeal No 16 of 1944 4th February, 1946

reported that Sushila Bala Ghosh was the proper person to be substituted in the place of Amal Krishna, but the learned Judges were of the opinion that there was no reason for excusing the delay in filing the application When the matter came on for hearing before this Court on receipt of this report, on 5th November, 1945, it was noticed for the first time that Amal Krishna had died before the appeal was filed in this Court and not after the appeal was filed The application was therefore dismissed as misconceived On the 15th of November, 1945, the application now under consideration was accordingly presented The matter has in effect to be dealt with on the footing that so far as the heir of Amal Krishna is concerned, an appeal is for the first time being preferred now

Notice of this application was issued to Sushila Bala Ghosh as well as to the respondents in the appeal Sushila Bala, the person sought to be added as the heir of Amal Krishna, alone appeared by counsel and opposed the application Two contentions have been urged on her behalf (1) it has been argued that even on the footing that Amal Krishna had died before the filing of the appeal in this Court, an application to add his legal representative as a party should on the terms of Order XV, rule 6 of the Federal Court Rules have been filed in the High Court and not in this Court, and (2) that no sufficient cause has been shown for not making this application or preferring an appeal so far as the new respondent is concerned within the period allowed by law The first contention proceeds on a misapprehension of rules 6 and 7 of Order XV Rule 6 no doubt deals with two classes of cases, namely, substitution of the representative of one who was a party to an appeal, and an addition of a party The present case obviously does not come under the first category, because Amal Krishna was not in the eye of the law a party to the appeal as originally preferred, as he had died before the date of the filing of the appeal The "addition" of parties referred to in the rule cannot cover the representative of a party in whose favour a decree had been passed by the lower Court, because in such a case the proper course will be to prefer an appeal against him and not merely add him as a party to an appeal that had already been preferred against other parties That this was the intention of the rule is shown by the fact that the reference in the same rule to section 5 of the Limitation Act is limited to applications to bring the legal representative of a deceased party on the record Rule 7 also shows that the addition spoken of in rule 6 refers to an addition necessitated by a party already on the record " undergoing a change of status" Where an appeal has to be preferred for the first time against the heir of a person in whose favour the lower Court had passed a decree, the mere fact that an appeal had already been preferred as against other persons will not justify the application being treated merely as one to add a party Even if it be so in form, it is in substance an appeal preferred against him for the first time, and it is only on that footing that the question of the application of section 5 of the Limitation Act to such cases will arise

The question of the sufficiency of the cause for the delay has to be decided in the light of the following facts The appellant company succeeded to the assets of an institution known as the Khulna Loan Bank, Ltd , by an order of the High Court passed on 12th May, 1941, under section 153-A of the Indian Companies Act. As these assets comprised numerous items of amounts due to the Bank under promissory notes, mortgage deeds and decrees, a large number of proceedings were started under the Bengal Money-lenders Act, 1940, to scale down the amounts due to the Bank under these various heads Some of these proceedings seem to have been pending in the High Court at Calcutta and some in the Courts in the mofussil Several appeals arising out of these proceedings have also come before this Court. It appears from the affidavits filed here that the appellant company had a law clerk, Sashi Bhushan Ghose, looking after the company's court work in Khulna It is not very clear which of the officers of the Bank was in charge of the business before the High Court at Calcutta ; but the affidavit filed here by the Secretary of the company states that it is the Secretary that looks after the cases before this Court It also appears from the record that all material papers relating to the present appeal had been sent to Delhi several days before the death of Amal

Krishna Ghose though the appeal was in fact filed in this Court six days after his death Mr. Dutt, the Calcutta advocate of the Bank, who is also an advocate of this Court, has sworn to an affidavit stating that he drew up and signed the petition of appeal in this case and forwarded it to Delhi some time in the middle of September, 1944, and he believed that the appeal had been filed in this Court before the 23rd of September, 1944, and that was the reason why he filed the application before the Calcutta High Court as a legal representative petition to bring on record the heir of a party who had died pending the appeal. He has also stated that it was only on the 5th of November, 1945, when the matter was being argued before this Court, that he became aware for the first time that the appeal had been filed on the 29th of September, that is after the death of Amal Krishna Ghose We have not been asked to reject these statements as untrue The Secretary of the appellant Bank has sworn to an affidavit stating that he was not aware of the death of Amal Krishna Ghose before enquiries were made in respect thereof, after receipt of the letter dated 19th January, 1945, from the Agent at Delhi, and we see no reason to reject the statement as untrue

It has however been pointed out that in December 1944, the law clerk at Khulna had been served with a petition in connection with another proceeding in the Court at Khulna to which the appellant Bank was a party, and that the factum and the date of Amal Krishna's death had been disclosed there The Secretary has stated that these facts were not communicated by the law clerk either to the Manager of the Khulna branch of the Bank or to the Head Office This is not improbable, because the question before the Khulna Court at that time only related to the legal representative of the deceased coming on the record and some extension of time in that connection was prayed for Both these might well have been treated as mere formal matters by the law clerk and the counsel there It is only if by a rule of law the knowledge of the agent can be treated as the knowledge of the principal that the appellant Bank can be fixed with knowledge of the factum and the date of Amal Krishna's death We are unable to hold that the doctrine of constructive knowledge can be applied to this case Sashi Bhushan Ghose was not a general agent, and he was not in charge of the legal work of the Bank before the Federal Court It was not his duty to make any report to the Bank in respect of matters which might have a bearing upon litigation pending before the Federal Court The fact that affidavits might sometimes have been sworn to by him, even in respect of litigations pending before the High Court or the Federal Court, will not show that he was in charge of the work before the Federal Court, because in so far as matters that happened in Khulna were concerned he would be the person naturally to be thought of to swear to an affidavit, whether he had charge of the Federal Court work or not In cases where the agent is under no duty to report, the principal cannot be fixed with knowledge of information acquired by the agent, unless the agent was acting as such in respect of the transaction in which the knowledge is material (Halsbury's Laws of England, Vol I, section 477)

In dealing with the question of sufficient cause, Courts have generally laid stress upon the diligence of the party concerned That the appellant Bank cannot be charged with lack of diligence is shown by the fact that the appeal in the case was filed even without waiting for the full period allowed for the purpose by the rules of the Court Likewise, the Secretary of the Bank put himself in communication with the Calcutta advocate almost immediately on receipt of the report of death from the Agent at Delhi, and the application before the Calcutta High Court was filed without any avoidable delay as soon as the fact and the date of the death of Amal Krishna had been ascertained from the Khulna records The proper test to be applied in dealing with such cases was adopted by the Allahabad High Court in *Lakshmi Chand* v *Behari Lal*[1] The learned Judges there said

> "We can find no justification for holding that ignorance of the death, in the absence of negligence or other act or omission for which the applicant can be held to be responsible, should not be held to be sufficient cause within the meaning of the Limitation Act"

1. (1931) I L.R 54 All 280.

Judged by this test the delay up to 6th February, 1945, must be held to have been satisfactorily explained.

As regards the interval between 6th February, 1945, and the date of the filing of the present application, the position as has been already stated, is that everybody including Counsel in Calcutta acted on the assumption that Amal Krishna died only after the appeal had been filed in this Court We see no reason for holding that in making this assumption the appellant or their counsel acted negligently, because the circumstances already set out might reasonably have led them to make this assumption If this mistake was discovered only on 5th November, 1945 (when the matter was being discussed before this Court) we think that the appellant is entitled to ask that the omission to present the application in its present form before that date should not be attributed to any negligence or lack of diligence. On behalf of the respondent, our attention was drawn to a decision of the Chief Court of Oudh, in *Mithoo Lal v Jamna Prasad*[1]. Even there the learned Judges declined to lay down any hard and fast rule and recognised that the question must be determined by reference to all the circumstances of each particular case, with a view to securing the furtherance of justice. The decision does not therefore materially help the respondent We accordingly direct that Sushila Bala Ghosh be added as a party to the appeal and that the cause title of the petition of appeal be amended accordingly There will be no order as to costs on this petition

G.R./V.S *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE PATANJALI SASTRI

The Commissioner of Income-tax, Madras .. *Applicant**

v

S A S Ramaswami Chettiar, Kanadukathan . *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (xii)—Amount made good by guarantor on default of re-payment by borrower—Right to a deduction under section 10 (2) (xii)—Amount can only be regarded as a business loss

The assessee, a money-lender, guaranteed a loan granted by a bank to a Chettiar firm and as the loan was not repaid by the borrower, he had to make good the amount of the loan to the bank On a question whether the assessee was in law entitled to the deduction of this amount in his assessment under section 10 (2) (xii) of the Income-tax Act,

Held, that it would be straining the language of section 10 (2) (xii) of the Act to hold that the deduction can be made under that provision , but this does not mean that the assessee is not entitled to the deduction. The amount represents a loss incurred by the assessee in carrying on his money-lending business and therefore he was entitled to the deduction Further, by reason of the practice among Nattukottai Chettiars in the matter of such mutual guarantees, the debt can only be regarded as a business loss

Case referred to the High Court by the Income-tax Appellate Tribunal, Bombay, under section 66 (1) of the Income-tax Act (XI of 1922), as amended by section 92 of the Income-tax Act (VII of 1939) in 66 R A Nos 6 and 7 Madras of 1944-45

C S Rama Rao Sahib for Applicant

M. Subbaraya Aiyar for Respondent

The Judgment of the Court was delivered by

The Chief Justice—The assessee is a Nattukottai Chetti who at all material times was carrying on a money-lending business in Rangoon He guaranteed a loan granted by a bank in Rangoon to the Chettiar firm of S A RM and as the loan was not repaid by the borrower, he was called upon to make good the amount, Rs 19,670, under his agreement of guarantee The assessee sought to deduct this sum as a loss when estimating his profits for the year of account 1939-40.

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1 A I R 1933 Oudh 523.

*Referred Case No 24 of 1945 22nd February, 1946

The Income-tax Officer and the Appellate Assistant Commissioner refused to allow the deduction, but on appeal to the Income-tax Appellate Tribunal, the assessee's contention was accepted. The Tribunal's decision was based on a common practice among Nattukottai Chettiars. It is their custom to borrow from banks for the purpose of lending out the sums so obtained on higher rates of interest. The banks require such overdrafts to be guaranteed by other Chettiars. The Chettiars stand surety for one another in these borrowings If a Chettiar refused to accommodate another money-lender in this way, he would not be able to obtain a guarantor for his own essential borrowings The assessee in this case borrowed money on the guarantee of others and in turn stood surety for other Chettiars. In these circumstances, the Tribunal considered that the sum of Rs 19,670 which the assessee was called upon to pay fell under section 10 (2) (*xii*), that is, it was an expenditure (not being in the nature of capital expenditure or personal expenses), laid out or expended wholly and exclusively for the purpose of his business

The Commissioner of Income-tax applied to the Tribunal to state a case to this Court as he considered that this decision was wrong in law. As a result the Tribunal has referred to this Court the following question :

"Whether in the circumstances of this case, the respondent is entitled in law to the deduction of Rs 19,670 in his assessment of 1940-41, under section 10 (2) (*xii*)" ?

We consider that it would be straining the language of section 10 (2) (*xii*) to hold that the deduction can be made under that provision ; but this does not mean that the assessee is not entitled to the deduction Before the 1939 Amendment Act, there was no provision in the Indian Income-tax Act for the deduction of bad debts when calculating the taxable profits of the business, but of course such debts had to be deducted in order to arrive at the true figure of the profits earned The sum of Rs. 19,670 represented a loss incurred by the assessee in carrying on his money-lending business and therefore he was entitled to the deduction. By reason of the practice among Nattukottai Chettiars to which we have referred this debt can only be regarded as a business loss

We answer the question referred in favour of the respondent. The Commissioner of Income-tax will pay the costs, Rs 250

V S *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR

S. Pichai Pillai . *Petitioner* *

Criminal trial—Lacuna in evidence—Benefit of doubt to accrue to accused—Retrial not to be ordered

If there is a *lacuna* in the evidence, the accused is entitled to have the benefit of the same The burden is on the prosecution to prove that the accused is guilty, and, if the evidence is not sufficient to bring the guilt home to the accused, the Judge has no other course but to acquit him Even if the offence was a serious one affecting the public interest, he is not justified in directing a retrial.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Sessions of Trichinopoly division in C. A No 56 of 1945 dated 29th September, 1945 (C. C No. 183 of 1944), Sub-Divisional Magistrate, Ariyalur)

V T. Rangaswami Aiyangar and *R. Santanam* for Petitioner.

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER :—The learned Sessions Judge considered that on the evidence on record the accused could not be convicted But at the same time he ordered a retrial because the offence was of a serious nature affecting the public interest and he was of opinion that there was a *lacuna* in the prosecution evidence. He

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*Crl R C No 1072 of 1945. 8th February, 1946.
(Crl. R P No 991 of 1945).

was not justified in doing so. The prosecution knew what they had to prove, and that they have not proved If there is a *lacuna* in the evidence, the accused is entitled to have the benefit of the same The burden is on the prosecution to prove that the accused is guilty and, if the evidence is not sufficient to bring the guilt home to the accused, the Judge has no other course but to acquit him Even if the offence was a serious one affecting the public interest, he was not justified in directing a retrial

The order of the Sessions Judge is set aside and the petitioner is acquitted.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE PATANJALI SASTRI.

The Commissioner of Income-tax, Madras *Applicant**

v

Rao Bahadur Ravula Subba Rao and another *Respondents.*

Income-tax Act (XI of 1922), *section* 26-A *and Income-tax Rules, rule* 6—*Application for renewal of registration of firm composed of two brothers—Signing by one on behalf of himself and of the other under a general power of attorney—Not a sufficient compliance with rule* 6 *of the Income-tax Rules—Powers-of Attorney Act (VII of* 1882), *section* 2—*Cannot override specific provision of rule* 6 *of the Income-tax Rules*

An application by a partner of a firm composed of two brothers for the renewal of its registration signed by himself and on behalf of the other partner under a general power of attorney from him has to be rejected as not complying with rule 6 of the Income-tax Rules The word "personally" used in that rule necessarily excludes the acting by an authorised agent of a partner and hence from signing an application on behalf of the other partner under section 26-A of the Income-tax Act.

Section 2 of the Powers-of-Attorney Act merely states the general principle of agency and cannot override a specific provision of a rule made under a different statute which requires a particular act to be done by a particular person " personally ", *i e*, by himself

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Income-tax Act (XI of 1922), as amended by section 92 of the Income-tax Act, 1939 (Act VII of 1939) in Application 26 Madras of 1944-45 on its file

C S Rama Rao Sahib for Applicant

The Advocate-General (*K Rajah Aiyar*) and *K Krishnamurthi* for Respondents

The Judgment of the Court was delivered by

Patanjali Sastri, J—This reference arises out of an application made by one Hariprasada Rao before the Income-tax Officer for the renewal of the registration of a firm composed of himself and his brother Rao Bahadur Ravula Subba Rao. The application was rejected by the Income-tax Officer on the ground that it was not signed by both the partners personally as required by rule 6 of the Rules made under section 59 of the Indian Income-tax Act, 1922, which provides :

" Any firm to whom a certificate of registration has been granted under rule 41 may apply to the Income-tax Officer to have the certificate of registration renewed for a subsequent year Such application shall be signed personally by all the partners (not being minors) of the firm, or where the application is made after the dissolution of the firm, by all persons (not being minors) who were partners in the firm immediately before dissolution and by the legal representatives of any such person who is deceased and accompanied by a certificate in the form set out below "

The assessee contended that as the other partner Ravula Subba Rao had gone on a long pilgrimage, he could not sign the application for renewal of the certificate of registration and that, as Hariprasada Rao held a general power of attorney from Ravula Subba Rao, his signature on behalf of the latter was sufficient compliance with the rule The Income-tax Officer negatived the contention and rejected the application On appeal to the Appellate Assistant Commissioner, the contention of the assessee was accepted with the result that the order of the

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*Case Referred No 16 of 1945 22nd February, 1946.

Income-tax Officer was set aside and he was directed to take the application on his file and dispose of it according to law. On appeal by the Officer to the Income-tax Appellate Tribunal, Madras Bench, the Tribunal concurred in the view of the Appellate Assistant Commissioner and dismissed the appeal On application by the Commissioner of Income-tax, under section 66 (1) to state a case to this Court, the Appellate Tribunal has referred the following question for our decision :

"Whether the word" personally ' in rule 6 of the Income-tax Rules, as framed under section 59 of the Income-tax Act would exclude a duly authorised agent of a partner from signing an application on behalf of the partner under section 26-A of the Income-tax Act ?"

It is contended for the Commissioner that the word "personally" used in the rule necessarily excludes acting by an authorised agent and that therefore the view taken by the Assistant Commissioner was erroneous in law We agree with this contention The learned Advocate-General appearing for the assessee has drawn attention to section 2 of the Powers-of-Attorney Act, 1882, which reads thus :

"The donee of a power of-attorney may, if he thinks fit, execute or do any assurance, instrument or thing, in and with his own name and signature, and his own seal, where sealing is required, by authority of the donor of the power, and every assurance, instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal of the donor thereof

This section applies to powers of attorney created by instruments executed either before or after this Act came into force "

The argument is that, by virtue of this provision, the act of Hariprasada Rao who, as has been stated, holds a general power of attorney from Ravula Subba Rao, in signing the application on behalf of the latter should be regarded as effectual in law as if Ravula Subba Rao had himself signed the application We are unable to accept this view The section merely states the general principle of agency and it cannot override the specific provisions of a rule made under a different statute which requires that a particular act should be done by a person "personally", *i e*, by himself

We answer the question referred accordingly in the affirmative

The learned Advocate-General wished to raise the question that rules 2 and 6 are *ultra vires* the rule-making authority, the Central Board of Revenue The question has not been referred to us and we express no opinion upon it.

The assessee will pay Rs 250 for costs of the Commissioner.

V S *Reference answered.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT —VISCOUNT SIMON, LORD THANKERTON AND SIR JOHN BEAUMONT.

M Samiullah . *Appellant**

v

The Collector of Aligarh *Respondent.*

Land Acquisition Act (I of 1894), sections 11 and 18—Awarding of compensation—Exercise of a statutory duty—Decision as to basis of valuation, if can be controlled by an agreement between the interested parties—Duty of a District Judge on a reference under section 18

During the proceedings before the Land Acquisition Officer it was agreed between all the parties thereto that in order to ascertain the market value of the lands concerned all the sale deeds relating to the sales in respect of an area less than 75 yards and sales more than 7 years before the date of the notification of proposed acquisition should be excluded from consideration On the question as to the scope and binding effect of such an agreement,

Held, that even if the agreement arrived at between the parties did cover the basis on which compensation was to be allowed, which their Lordships think it did not, such agreement could not bind the Land Acquisition Officer or the District Judge in the performance of their statutory duties under the Land Acquisition Act The Land Acquisition Officer in awarding the amount of compensation under section 11 of the Act is performing a statutory duty, a duty the exercise of which, in cases where the land is to be acquired for a public purpose, concerns the public, since it affects the

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* P C Appeal No 75 of 1944. 14th January, 1946.

expenditure of public money In assessing compensation he is bound to exercise his own judgment as to the correct basis of valuation, and his judgment cannot be controlled by an agreement between the parties interested. On a reference under section 18 the District Judge must also exercise his own judgment and consider, among other things, whether the award of the Land Acquisition Officer was based on a correct principle

C. S. Rewcastle, K. C. and *Dingle Foot* for Appellant.

T. M. Tucker, K C and *W. Wallach* for Respondent.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT —These are two consolidated appeals from the judgment and decree of the High Court of Judicature at Allahabad, dated the 3rd September, 1940, modifying the judgment and decree of the District Judge of Aligarh dated the 18th August, 1936, which in turn modified the award of the Land Acquisition Officer, Aligarh, dated the 7th November, 1933

The land to which the first appeal relates consists of twelve bighas and nine biswas, which were held by the appellant as the mutwalli of waqf property The land to which the second appeal relates consists of one bigha which was the appellant's personal property These lands were acquired, together with other adjacent lands belonging to other owners, for the Co-operative Housing Society Ltd , Aligarh, under Government Notification dated 29th May, 1930, and issued under the provisions of the Land Acquisition Act At that time the whole area held by the appellant was occupied by two tenants, Abdul Karim and Karu

During the proceedings before the Land Acquisition Officer it was agreed between all the parties before him first, that in order to ascertain the market value of the land concerned all the sale deeds relating to the sales in respect of an area less than 75 yards should be struck off, and secondly, that the exemplars for evolving sales, that is sale deeds relating to other sales, should be taken into consideration as far back as the year 1923, *i e*, 7 years preceding the year 1930, excluding the transactions which had some special grounds for being too high or too low or which might be inadmissible on any other ground to be decided by the Land Acquisition Officer

The Land Acquisition Officer decided to apply a flat rate in respect of the lands under acquisition and to fix that flat rate at 5 annas, 1 pie per square yard and he fixed the compensation payable to the appellant on that basis It is not shown in the award made by the Land Acquisition Officer how the figure of 5 annas, 1 pie per square yard was arrived at, but from the judgment of the High Court now under appeal it appears that the Land Acquisition Officer took 28 exemplars, selected from a much larger number, which had taken place within the previous 7 years, that he added up the number of square yards sold in such transactions and the prices paid thereon and, by striking an average reached the figure of 5 annas, 1 pie per square yard, and awarded to the appellant in respect of both his personal and waqf property a sum of Rs 14,127-13-6

On the 27th August, 1934, the appellant lodged an application to the Collector as Land Acquisition Officer under section 18 of the Land Acquisition Act, 1894, for reference to the Civil Court regarding the acquisition of the properties on the ground that the compensation awarded was inadequate In his written statement the Collector pleaded that the award of the Collector was made on the basis of the statement of parties "that the value be fixed on the basis of certain sale deeds on the file," and therefore the applicant had no right to question the award. The learned District Judge raised two issues which are material —

(1) Whether the compensation awarded is adequate? If not what is the proper compensation?

(2) Whether the rate of compensation was fixed with the consent of the applicants and the acquiring body? If so, how does it affect the case?

The learned Judge dealt with the second issue first. He noted that the agreement of the parties excluding sale deeds relating to areas less than 75 yards and sales more than 7 years before the notification were relied on on behalf of the Collector to preclude the applicants from questioning the award. The learned Judge

rejected this contention, holding that the agreement only related to the evidence to be relied on for the purpose of determining the value, and that the parties had not consented to be bound by the conclusion drawn by the Land Acquisition Officer on the basis of such evidence The learned Judge then considered the 28 exemplars which had been relied on by the Land Acquisition Officer and came to the conclusion that the conditions of the sale deed, Exhibit 84, one of the 28 exemplars, bore a very close resemblance to the conditions relating to the acquisition of the appellant's land, and that the rate at which the land in that exhibit was sold, namely, 10 annas, $10\frac{1}{2}$ pies per square yard, afforded the best basis for valuation of the appellant's land. Accordingly he allowed that rate, and, adding 15 per cent for compulsory acquisition, increased the amount awarded to the appellant to Rs 29,202-6-10

From the decision of the learned District Judge the appellant appealed to the High Court There was also an appeal by the Collector and by one of the tenants of the appellant's property, but as those parties have not appealed to His Majesty in Council their cases need not be considered The learned Judges of the High Court disagreed with the learned District Judge in his answer to issue 2, and stated their opinion in these words :—

"We are also of the opinion that there was a binding agreement between the parties that certain exemplars afforded the basis for determing the market value of the various properties The agreement was not only that transactions involving less than 75 square yards and of a period anterior to 1923 should be excluded, but the Land Acquisition Officer was further given the power to reject some transactions on the ground of 'being too high or too low', or by reason of being 'inadmissible on any other ground', and therefore the parties agreed that the exemplars that might then remain after the exercise of discretion by the Land Acquisition Officer would constitute the basis for determining the market price, and we have to determine the market vlaue of the land at the date of the publication of the notification under section 4 of the Act"

Their Lordships are not in agreement with this opinion of the High Court, which seems to show some misconception of the functions of the Land Acquisition Officer and the Court under the Land Acquisition Act. Even if the agreement arrived at between the parties did cover the basis on which compensation was to be allowed, which their Lordships think it did not, such agreement could not bind the Land Acquisition Officer or the District Judge in the performance of their statutory duties under the Land Acquisition Act, as is clear from an examination of the relevant provisions of the Act.

Under section 4 of the Act it is provided that where it appears to the Provincial Government that land is needed for any public purpose a notification to that effect is to be published as directed. Under section 5 (*a*) persons interested in the land which has been notified may object to its acquisition, and the Collector has to hear the objection and make a report thereon to Government Under section 6, if the Government is satisfied, after considering the Collector's report, that the land is needed for a public purpose or for a company (a subject dealt with in later sections of the Act) a declaration to that effect has to be made and published. Under section 9 notice has to be published by the Collector stating that the Government intend to take the land and that claims to compensation for all interest in such land may be made to him Under section 11 the Collector has to inquire into the value of the land at the date of the publication of the notification under section 4 and into the respective interests of persons claiming compensation and to make an award of (*inter alia*) the compensation which in his opinion should be allowed for the land Under section 12 notice of the award has to be given Under section 18 any person interested who has not accepted the award may by written application to the Collector require him to refer the matter (which may include the amount of compensation) to the Court. Under section 19 (1) (*d*) the Collector in making the reference is required to state for the information of the Court, if the objection be to the amount of compensation, the grounds on which the amount of compensation was determined Under section 23, the Court is required to take into consideration (*inter alia*) the market value of the land at the date of the publication of the notification under section 4 and to add 15 per cent. to the market value for compulsory acquisition. Under section 26, the award is to be deemed a decree. "Collector" is defined in the Act, as including a deputy Collector

and any officer specially appointed by the Provincial Government to perform the functions of a Collector under the Act.

It is clear, therefore, that the Land Acquisition Officer in awarding the amount of compensation under section 11 is performing a statutory duty, a duty the exercise of which, in cases where land is to be acquired for a public purpose, concerns the public, since it affects the expenditure of public money In assessing compensation he is bound to exercise his own judgment as to the correct basis of valuation, and his judgment cannot be controlled by an agreement between the parties interested. On a reference under section 18 the District Judge must also exercise his own judgment and consider, amongst other things, whether the award of the land Acquisition Officer was based on a correct principle. If in this case the District Judge considered that the market value of the land to be acquired could be better ascertained by basing it upon a sale of neighbouring land in which the conditions closely resembled those affecting the land to be acquired, rather than by taking an average of prices obtained on a large number of sales in which the conditions were less similar, he was entitled and bound to act upon his own view. In appeal the Judges of the High Court were free to disagree with the District Judge if they thought him wrong, but this they do not appear to have done They held that the District Judge was not free to act upon his own view because it conflicted with the agreement between the parties Their Lordships have thought it right to make these observations lest they should be supposed to countenance a construction of the Act which in their view unjustifiably restricts the duties and obligations of the Land Acquisition Officer and the Court thereunder There is, however, no cross-appeal by the Collector, and the appellant does not seek the restoration of the order of the District Judge, and the actual question which arises for decision is confined within a narrow compass

Having decided that the Order of the District Judge was wrong, the learned Judges of the High Court said that the 28 transactions remained for consideration, and the method of striking the average was the only method by which the market price could be fixed, but they thought that the Land Acquisition Officer had adopted a wrong method of striking the average They considered that the rate in connection with each of these transactions ought to be first determined, that the rates so evolved should be added up, and the total divided by 28, the number of the transactions On this basis the average rate worked out at Rs 1-4-0 per square yard. The learned Judges then proceeded in these terms :

"It is also agreed before us that in the case of the 28 exemplars the land was not burdened with occupancy tenants, whereas in the cases before us the land is so burdened. There is nothing in the order of the Land Acquisition Officer to show that he paid any regard to this aspect It is not always easy to induce occupancy tenants to surrender their rights and an attempt in that direction always involves some trouble and some expense We think that 8 annas per square yard should be deducted for this trouble and expense and the zamindars ought to be awarded compensation at the rate of 12 annas per square yard "

Accordingly the amount awarded to the appellant was increased by Rs 2,775-12-3.

In this appeal the appellant accepted the rate of R. 1-4-0 per square yard, but objected to the deduction of 8 annas per square yard in respect of occupany tenancies, an expression defined in the Agra Tenancy Act, 1926 The appellant contended that the learned Judges of the High Court were under a misapprehension in saying that it had been agreed before them that in the case of the 28 exemplars the land was not burdened with occupany tenants The appellant does not seem to have challenged the reference to this alleged agreement in the judgment of the High Court before the decree based thereon became binding, nor are there upon the record any notes of the learned Judges made at the hearing upon this point. The appellant admits that as to most of the 28 exemplars there is no evidence as to whether the land was subject to occupancy tenancies or not, and he says that the matter was never gone into It has been argued, however, before their Lordships that there are 4 cases comprised in the 28 exemplars in which the record shows that there were occupancy tenants. But when examined it appears that in 3 of those cases the tenants who were upon the land were not occupany tenants.

The only case in which it is shown that there was an occupancy tenant is that comprised in exhibit 84, the exemplar relied on by the learned District Judge, and no doubt, in that case there must have been an occupancy tenant or the exemplar could not have been relied on as affording an accurate comparison with the case of the appellant The appellant has failed to satisfy their Lordships that the statement in the High Court judgment that it had been agreed that in the case of the 28 exemplars land was not burdened with occupancy tenants was wrong, or that there is any ground on which it would be right to allow further evidence on the point to be taken This really disposes of the appeal It was objected by the appellant that the High Court was wrong in treating all the 28 exemplars on precisely the same footing in relation to occupancy tenants without making any inquiry into the circumstances of particular cases, and further, that 8 annas per square yard is too heavy a deduction to make merely on account of trouble and expense in getting rid of occupancy tenants These, however, are mere questions relating to value on which it is not the practice of their Lordships' Board to interfere, recognising, as they do, that the local knowledge of Courts in India on such matters is of the greatest value.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed The appellant must pay the costs of the respondent.

Solicitors for Appellant : *Douglas, Grant and Dold*

Solicitor for Respondent : *Solicitor, India Office.*

H J U./V.S. *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE LAKSHMANA RAO.

Khan Bahadur Chowkaran Keloth Mammad Keyi . *Appellant**

v

The Province of Madras represented by the Collector of South Kanara and another *Respondents.*

Land Acquisition Act (I of 1894), *sections* 4, 6 *and* 48 (1)—*Notifications under sections* 4 *and* 6—*Objection by owner—Government deciding to withdraw from acquisition—Necessary notification under section* 48 (1), *not issued—Government changing its mind and proceeding with acquisition—Legality of acquisition—Fresh notification under sections* 4 *and* 6—*If necessary*

After the issue of notifications under sections 4 and 6 of the Land Acquisition Act on objection by the owner of the land concerned the Government decided to withdraw from the acquisition But before the necessary notification under section 48 (1) of the Act in regard to the withdrawal was issued, the Government once again changed its mind and proceeded with the acquisition and the land was duly acquired

In a suit by the owner for a declaration that the acquisition was unlawful in that the Government could not have proceeded with the proceedings without fresh notifications under sections 4 and 6 of the Act,

Held, Rule 5 of the rules framed under the Act makes it compulsory for Government to notify a withdrawal if it decides on such a course As the Government had decided to go on with the acquisition before any such notification under section 48 (1) was issued, it was, in the circumstances, entitled to do so without re notification under sections 4 and 6 and the acquisition was quite lawful

Appeal under clause 15 of the Letters Patent against the judgment and decree of Chandrasekhara Aiyar, J , dated 11th April, 1945, in S. A No 1146 of 1944, preferred to the High Court against the decree of the District Court of South Kanara in A. S No 441 of 1940 (O S. No 305 of 1938, District Munsiff Court, Kesargod.)

D Ramaswami Aiyangar for Appellant

The Government Pleader (*K. Kuttikrishna Menon*) for Respondents

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* L. P. A. No 39 of 1945 10th January, 1946.

The Judgment of the Court was delivered by

The Chief Justice.—In the year 1936 the Government of Madras proposed to acquire a small strip of land for the purpose of making a foot path by the side of a Hindu cremation ground at Kesargod. The total area only measured 13 cents of an acre On the 26th August, 1936, a notification was published under section 4 of the Land Acquisition Act and on the 26th January, 1937, a notification was published under section 6 of the Act The appellant, who was the owner of the land, objected to the acquisition and after the publication of the notification under section 6, he persisted in his objection He succeeded in persuading the Collector of South Kanara that the acquisition was not necessary The result was that the Government changed its mind and passed an order which said:

> "The Collector of South Kanara is therefore requested to take steps to withdraw from the acquisition proceedings and submit through the Board of Revenue the necessary notification to Government under section 48 (1) of the Land Acquisition Act, for publication"

As a result of representations made by the District Board, the Government again changed its mind and decided to proceed with the acquisition. No notification of withdrawal under section 48 (1) had been published This later order was passed on the 10th November, 1937. Accordingly the acquisition proceedings were continued and the land was duly acquired.

On the 18th July, 1938, the appellant filed a suit in the Court of the District Munsiff of Kesargod for a declaration that the acquisition was unlawful on the ground that as the Government had decided to withdraw from the acquisition it could not proceed without fresh notifications under sections 4 and 6 of the Act. The District Munsiff dismissed the suit and this decision was concurred in by the District Judge of South Kanara on appeal The plaintiff then appealed to this Court The appeal was heard by Chandrasekhara Aiyar, J., who agreed with the Courts below The present appeal is from the Judgment of the learned Judge under clause 15 of the Letters Patent.

Sub-section (1) of section 48 says that except in the case provided for in section 36 (which does not apply here) the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken. Rule 5 of the rules framed under that Act states that if Government decides to give up the acquisition a notification under section 48 (1) withdrawing from it shall be published by it. It is not suggested that this rule is *ultra vires.* In fact, the learned Counsel for the appellant accepts that it is *intra vires* The rule makes it compulsory for Government to notify a withdrawal if it decides on this course The order to the Collector of South Kanara merely directed him to take steps to withdraw the acquisition proceedings and submit through the Board of Revenue the necessary notification for publication As we have shown, before the notification was published the Government decided to go on with the acquisition. We consider that in the circumstances it was entitled to do so without re-notification under sections 4 and 6

It is very regrettable that so much judicial time should have been taken up on such a trumpery matter. Even if the law had been on the side of the appellant, it could only have meant re-notification under sections 4 and 6 with waste of time and unnecessary expenditure of money The acquisition could not have been avoided The mentality of the appellant is indeed difficult to understand The only satisfaction is that he can be required to pay for his bovine obstinacy in costs

The appeal is dismissed with costs

V.S. ——— *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad)

PRESENT —LORD THANKERTON, LORD GODDARD AND SIR JOHN BEAUMONT

Chhabba Lal ... *Appellant**

v

Kallu Lal and others ... *Respondents*

Civil Procedure Code (V of 1908), Order 32, rule 7—Imperative nature of—Applicability to agreement to refer matters in dispute to arbitration—Successful attack by minor on the validity of agreement to refer—Effect as against other parties—Civil Procedure Code, second schedule, paras 15 and 16 (2)—Objection to validity of reference—If comes within the provisions of section 15—Evidence Act (I of 1872), section 20—Reference to outside party to decide matters in dispute in suit and the question of costs—Reference not justified by section 20

Rule 7 of Order 32, Civil Procedure Code, is imperative and its terms must be strictly complied with The rule applies to an agreement to refer matters in dispute to arbitration

Mariam Bibi v *Amna Bibi*, I L R (1937) All 317 (F B), approved on this point.

Such an agreement, which removes the decision of a matter in dispute from the jurisdiction of the Court and refers it to some outside party is clearly an agreement with reference to the suit and not only falls within the terms of the rule, but comes within the mischief at which the rule appears to be aimed

If minors successfully challenge an agreement to refer to arbitration as not made in compliance with sub-section (1) of rule 7 it is avoided against all parties under sub-section (2)

An objection to the validity of reference to arbitration does not come within the provisions of paragraph 15 of the second schedule to the Civil Procedure Code

Mariam Bibi v *Amna Bibi*, I L R (1937) All 317 (F B), overruled on this point

All the powers conferred upon the Court in relation to an award on a reference made in a suit presuppose a valid reference on which an award has been made which may be open to question If there is no valid reference, the purported award is a nullity, and can be challenged in any appropriate proceeding

A reference to an outside party to decide matters in dispute in a suit and the question of costs is not a reference to that party for information in reference to a matter in dispute, and is not justified by section 20 of the Evidence Act It might have been made under paragraph 7 (1) and (3) of the second schedule to the Civil Procedure Code and it is open to the appellate Court to treat it as so madea nd regard the allusion to section 20 of the Evidence Act as a mistake

Sir Thomas Strangman, K C and *W Wallach* for Appellant.

C S Rewcastle, K C and *S Hyam* for Respondents

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT —This is an appeal from a decree of the High Court of Judicature at Allahabad dated the 8th September, 1939, which set aside a decree of the Subordinate Judge of Cawnpore dated the 3rd November, 1933, passed in a partition suit and sent the case back to the Subordinate Judge with directions to readmit it under its original number and to decide it in accordance with law

The question for decision is whether a reference to arbitration made in this suit, and an award made thereon, were valid as the Subordinate Judge held, or invalid as the High Court of Allahabad held in appeal

The question arises in the following circumstances.

The plaintiff brought this suit for division of the property of a Hindu family governed by the Mitakshara The plaintiff was the son of one Mukta Prasad, and the first three adult defendants, Kallu Lal, Sohan Lal and Sewak Lal were the sons of the only brother of Mukta Prasad, whilst the fourth and fifth defendants, Ram Lal and Jainarain, were the minor sons of Kallu Lal The plaintiff alleged that the family had separated in status, but that the property had not been divided, and he claimed partition of the property and that a half share be allotted to him In their written statement, the adult defendants alleged that the family was still joint, but the claim for partition was not disputed In the suit, Sohan Lal was appointed guardian-at-litem of the minor defendants, and as such he adopted the written statement of the adult defendants.

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* P C Appeal No 29 of 1944 — 21st January, 1946

On the 1st September, 1933, an application was made to the Subordinate Judge by Kallu Lal, Sewak Lal and the plaintiff stating that the parties had appointed Shri Swami Ramanandji, who was the Guru of the parties, a referee for the decision of all the facts in dispute in the suit and also for the decision in respect of the costs of the suit and they asked that the Swami might be appointed a referee under section 20 of the Indian Evidence Act On the 2nd September, 1933, Sohan Lal appeared before the learned Subordinate Judge and verified this application and the learned Judge made the following note

"This application was verified to-day by Sohan Lal, defendant, on being identified by Babu Munna Lal, Vakil, after hearing and understanding the same "

On the 4th October, 1933, the learned Judge made an Order that according to the application of the parties, Shri Swami Ramanandji was appointed a referee under section 20 of the Evidence Act for deciding this case and directed him, after deciding the case, to present himself in Court or send in writing, his statement in respect thereof On the 7th October, 1933, the referee made his report dividing the family property into two parts allotting one part to the plaintiff and the other to the defendants Objections to the report on behalf of the minors were lodged on the 17th October, 1933, the two principal objections being first that the guardian of the minors did not purport to act as a guardian entering into the agreement for reference and that as no previous sanction of the Court had been obtained the agreement was not binding on the minors, and secondly that the alleged agreement in terms only constituted Swami Ramanandji a referee under section 20 of the Indian Evidence Act and that as such he could only make statements and had no authority to make a division of the property Objections were also filed on behalf of the adult defendants alleging fraud against the Swami but it is not necessary to consider these objections On the 3rd November, 1933, the learned Subordinate Judge, having held that the reference to arbitration and the award were valid, passed a decree in the terms of the award

From this decree an appeal was brought to the High Court of Allahabad which on the 8th September, 1939, allowed the appeal, set aside the decree of the lower Court and sent the case back to the lower Court to readmit under its original jurisdiction and to decide in accordance with law From this decree the present appeal is brought

Neither the learned Subordinate Judge nor the High Court dealt with the objection that the reference was not justified by section 20 of the Evidence Act. That section is in these terms ·

"Statements made by persons to whom a party to a suit has expressly referred for information in reference to a matter in dispute are admissions "

It is obvious that a reference to an outside party to decide matters in dispute in a suit and the question of costs is not a reference to that party for information in reference to a matter in dispute, and if the reference is to be regarded as made only under section 20 it was a bad reference However, the reference might have been made under the provisions of paragraph 7 (1) and (3) of the Second Schedule to the Code of Civil Procedure, and their Lordships will treat the reference as so made, as the Courts in India seem to have done, and regard the allusion to section 20 of the Evidence Act as a mistake

The second objection requires more consideration Order 32, rule 7 provides :

"(1) No next friend or guardian for the suit shall, without the leave of the Court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian (2) Any agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor "

The learned Subordinate Judge explained in his judgment disposing of the objections what took place in relation to the application for reference He said that Sohan Lal in the first instance had not signed the application for a reference, and accordingly the learned Judge directed that Sohan Lal should be brought before him the next day Sohan Lal duly appeared the next day and verified the agreement. The learned Judge considered that, since Sohan Lal signed the

agreement without qualification, that is without specifying whether he was acting in his own capacity or as guardian-at-litem of the minors he must be taken to have signed in all capacities in which his signature was required, and their Lordships are disposed to accept that view The learned Judge further considered that by referring the matter to arbitration the Court must be taken to have been satisfied that the reference would be for the benefit of the minors There was indeed no reason to doubt this because the interest of the minors was identical with that of the other defendants, their father and uncles, and there was no reason to suppose that the interests of the minors was likely to be sacrificed At the same time it is clear that the terms of Order 32, rule 7 were not complied with There was no formal application by the guardian-at-litem for the leave of the Court to his entering into the agreement for reference to arbitration, nor was any such leave formally given, or expressly recorded in the proceedings The note on the record quoted above does not show that the Judge realised that he was dealing with the guardian-at-litem of minors The requirement in Order 32, rule 7 that the leave of the Court be expressly recorded in the proceedings was added in 1908, and Sir Thomas Strangman for the appellant says that the addition to the rule merely gave statutory effect to the previous practice Be that as it may, the rule is imperative and in their Lordships' view its terms must be strictly complied with Their Lordships agree with the view of the High Court following on this point, a ruling of a Full Bench of the Allahabad High Court *Mariam Bibi* v *Amna Bibi*[1], disagreeing with certain other Indian rulings, that Order 32, rule 7 applies to an agreement to refer matters is dispute to arbitration Such an agreement, which removes the decision of a matter in dispute from the jurisdiction of the Court and refers it to some outside party is clearly an agreement with reference to the suit and not only falls within the terms of the rule, but comes within the mischief at which the rule appears to be aimed The interests of minors might well be sacrificed by an improper reference to arbitration and it is necessary that their interest be protected by the Court. If minors successfully challenge an agreement to refer as not made in compliance with sub-section (1) of rule 7, it is avoided against all parties under sub-section (2)

Sir Thomas Strangman has taken a second point, namely, that it is too late to challenge the award since no appeal lay from the decree of the Subordinate Judge made in terms of the award In support of his argument he relies on the provisions of paragraph 16 (2) of the second schedule to the Code of Civil Procedure The section is one of a group of sections conferring powers upon the Court in relation to an award made on a reference in a suit Section 12 gives power to the Court to modify the award in certain cases Section 14 empowers the Court to remit the award or any matter referred to arbitration to the reconsideration of the arbitrator in the cases specified Section 15 provides that no award shall be set aside except on the specific grounds mentioned, or the award " being otherwise invalid " Section 16 provides that where the Court sees no cause to remit the award and no application has been made to set aside the award or the Court has refused such application the Court shall after the time for making such application has expired proceed to pronounce judgment according to the award Then sub-section (2) provides that upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of, and not in accordance with, the award The argument of Sir Thomas Strangman is that under the section the decree of the Subordinate Judge is final, and for this he relied on the case of *Mariam Bibi* v *Amna Bibi*[1].

The ruling of the Court in that case that Order 32, rule 7 applies to an agreement to refer to arbitration has already been noted with approval A further question referred to the Full Bench was

"Whether an objection to the validity of reference to arbitration comes within the provisions of paragraph 15 of the Second Schedule to the Code of Civil Procedure."

The learned Chief Justice and Harries, J, considered that it did, relying on the words " being otherwise invalid " in paragraph 15 ; Iqbal Ahmad, J, considered

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1 I L R (1937) All 317 (F B)

that it did not. Upon this question their Lordships agree with the view of Sir Iqbal Ahmad In their opinion all the powers conferred upon the Court in relation to an award on a reference made in a suit presuppose a valid reference on which an award has been made which may be open to question. If there is no valid reference, the purported award is a nullity, and can be challenged in any appropriate proceeding By way of contrast the language of paragraph 21 of the Second Schedule may be noted. That paragraph empowers the Court to pronounce judgment according to an award made on a reference out of Court, and the opening words require the Court to be satisfied that the matter has been referred to arbitration. There are no such words in paragraph 16 In their Lordships' view therefore an appeal lay to the High Court in this case.

For these reasons their Lordships think that the decision of the High Court was right and they will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the respondents.

Solicitors for Appellant *Hy. S L. Polak & Co.*

Solicitors for Respondents *Barrow, Rogers* and *Nevill*

H J U./V S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE PATANJALI SASTRI AND MR JUSTICE BELL

Kasturi Venkata Subbarao and another *Appellants**

v.

Bikkina Veeraswami and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 58 (a), (c) and (g)—Two documents—Covenant for reconveyance contained in different document—Effect—Transaction whether amounts to mortgage

The effect of the proviso to section 58 (c) of the Transfer of Property Act is that an ostensible sale with a stipulation for a re-purchase shall not be regarded as a mortgage unless the stipulation is contained in the same document which effects the sale Where the stipulation for reconveyance is contained in a document other than the deed of mortgage it cannot be contended that the transaction is nonetheless a mortgage falling under section 58 (g) of the Transfer of Property Act

Ma Sein Nyo v *Maung San Pe*, A I R 1935 Rang 212, referred to

Appeal against the order of the Court of the Subordinate Judge of Amalapuram, dated 15th December, 1943, and made in O P No 8 of 1941

T S Narasinga Rao for Appellants

P Somasundaram, A Sambasiva Rao, M Appa Rao, K Bhimasankaram and *N. Bapi Raju* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J—This is an appeal from an order refusing to scale down what is claimed to be a mortgage at the instance of the appellant who applied for relief under Madras Act IV of 1938 The application was dismissed on the ground that the transaction in question was not a mortgage at all but an absolute conveyance with a condition of retransfer and there was no debt which could be scaled down under the Act.

The transaction was embodied in two documents, Exs D-1 and P-1, both dated the 22nd December, 1931 Ex D-1 purports to be an out-and-out sale of the properties referred to therein to the respondent for Rs 6,500 and Ex P-1 provides that the properties shall be re-conveyed to the appellant on re-payment of the price within ten years. The appellant contended that the two documents taken together evidenced a mortgage by conditional sale and attempted to show by reference to the surrounding circumstances the real nature of the transaction according to the intention of the parties The Court below refused to go into that

* A. A. O No 500 of 1944 31st January, 1946.

question in view of the new proviso to section 58 (*c*) of the Transfer of Property Act added by the Amending Act of 1929 The proviso runs thus

"Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale"

The language of the proviso is perfectly clear and unambiguous, and its effect is that an ostensible sale with a stipulation for repurchase shall not be regarded as a mortgage unless the stipulation is contained in the same document which effects the sale The appellant's learned counsel argues that, as the new provision has been introduced as a proviso to clause (*c*) which defines a mortgage by conditional sale, it should not be understood as having a wider scope than the clause itself, and should not be taken to limit or qualify in any way clause (*a*) which defines a mortgage . in other words, that the proviso should be read as providing only that such a transaction shall not be deemed to be a *mortgage by conditional sale*, with the consequence that it can still be regarded as a mortgage falling under clause 58 (*g*) if it is established that the intention of the parties was that the transaction should operate as a mortgage and not an outright sale with a condition of re-transfer This argument cannot be accepted The construction suggested would involve reading into the proviso words which are not there, and it would, moreover, stultify the new enactment as it would leave the previous state of the law practically unchanged For it would not make much difference in the legal effect of a sale accompanied by a separate agreement for repurchase to provide that it shall not be deemed to be a mortgage by conditional sale but may be regarded as an anomalous mortgage We do not think that the proviso was intended to have that effect. Its object evidently was to shut out an inquiry whether a sale with a stipulation for retransfer is a mortgage where the stipulation is not embodied in the same document This is the view taken of the effect of the proviso in *Ma Sein Nyo* v. *Maung San Pe*[1] and we agree with it.

The appeal fails and is dismissed with costs, two sets, one for respondent 1 and one for the other respondents

B V V *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE LAKSHMANA RAO

The Kumbakonam Mutual Benefit Fund, Ltd .. *Appellant**

v.

C Ramaswami and another .. *Respondents.*

Hindu Law—Joint family—Mo tgage by father on behalf of himself and his sons—Decree—Sale—Proceeds insufficient—Application for personal decree against father and sons—Application against one of the sons withdrawn —Personal decree against the father and the other son—Sale of family property—Application to set aside sale as regards his share by the son against whom there was no personal decree—Liability of his share under the pious obligation rule of Hindu Law

A mortgage was executed by a Hindu father on behalf of himself and his three minor sons constituting a joint family In a suit by the mortgagee a final decree was passed, but the price realised for the hypotheca in execution fell short of the amount due under the decree The decree-holder filed an application for a personal decree against the father and his two surviving sons, limited so far as the sons were concerned to their interests in the joint family As the decree-holder experienced some difficulty in serving the first respondent (one of the sons) he filed a memorandum indicating his intention of withdrawing the application for a personal decree against the first respondent, and a personal decree was passed against the father and the other surviving son and in execution the joint family properties were sold On an application by the first respondent to set aside the sale in so far as it affected his one-third share,

Held, that in the circumstances his share was liable under the pious obligation rule of Hindu Law.

Appeals under clause 15 of the Letters Patent against the order of Bell, J., dated 2nd August, 1945, in A A A O. No 344 of 1944, preferred against the order of the Court of the Subordinate Judge, Kumbakonam, dated 14th April, 1944,

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1 A I R 1935 Rang 212

* L P A Nos 51 and 53 of 1945 5th February, 1946

in A S No 45 of 1944, preferred against the order of the Court of the District Munsiff, Kumbakonam, dated 26th February, 1944, in E A No 782 of 1943, in O. S No 91 of 1935.

L.P A No. 51 *of* 1945.

K.S Desikan for Appellant

G Srinivasa Aiyangar for Respondents.

L.P A. No. 53 *of* 1945

R. Rajagopala Aiyangar for Appellant

K S Desikan and *G Srinivasa Aiyangar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice —These two appeals are from a judgment of Bell, J , delivered in a second appeal Appeal No 51 of 1945 has been filed by the holder of a mortgage decree and Appeal No 53 of 1945, by the purchaser of the property at the sale held by the Court in execution

The mortgage was executed by a Hindu father on behalf of himself and his three minor sons They constituted a joint family On the 24th June, 1935, in O. S. No 91 of 1935, of the Court of the District Munsiff of Kumbakonam, the mortgagee obtained a preliminary decree and on the 13th November, 1935, a final decree. The price realised for the hypotheca in execution fell short of the amount due under the decree by Rs 308-4-0 On the 7th January, 1941, the decree-holder filed an application for a personal decree against the father and his two surviving sons, limited so far as the sons were concerned to their interests in the family estate One of the sons had died before the application was filed One of the two surviving sons (the first respondent in these appeals) was a minor The decree-holder experienced some difficulty in serving the first respondent and on the 30th July, 1941, he filed a memorandum indicating his intention of withdrawing the application for a personal decree so far as the first respondent was concerned It would appear that by this time the first respondent had become a major As the result of the decree-holder having decided to withdraw the application against the first respondent a personal decree was passed against the father and his other surviving son, limited, of course, so far as the latter was concerned to his interests in the family property

The decree-holder then applied to execute the personal decree by the attachment of certain family properties The attachment was ordered and the properties were in due course sold Within a month of the sale the first respondent applied to the Court of the District Munsiff of Kumbakonam for an order setting aside the sale in so far as it affected his one-third share in the properties The District Munsiff dismissed the application on the ground that the pious obligation rule of Hindu Law applied The first respondent appealed to the Subordinate Judge of Kumbakonam without success The Subordinate Judge held that the case was governed by *Krishnan* v *Sami*[1] The first respondent then appealed to this Court. The appeal was heard by Bell, J , who considered that the governing authority was *Venkataranga Reddi* v *Chinna Sithamma*[2] and consequently allowed the appeal, but he gave leave to appeal

We consider that the Subordinate Judge rightly held that this case fell within *Krishnan* v *Sami*[1] It was there held that where a decree was obtained against a Hindu father, it could be executed against the interests of his sons in the joint estate, notwithstanding that they had been dismissed from the suit It was argued that in *Raja Ram* v *Raja Baksh Singh*[3], the Privy Council had overruled the judgments of the Full Bench of this Court in *Periaswami Mudaliar* v *Seetharam Chettiar*[4], but this contention was rejected and the Court followed *Periaswami* v *Vaithilingam Pillai*[5] (Varadachariar and Pandrang Row, JJ) and *Doraiswami* v *Nagaswami*[6]

1 (1940) 1 M L J 363 I L R (1940) Mad 815 (P C)
2. (1941) 1 M L J 270
3 (1938) 1 M L J 41 I L R 13 Luck 61
4 (1903) 14 M L J 84 I L R 27 Mad 243.
5 (1937) 47 L W 60
6 A I R 1929 Mad 898

(Coutts-Trotter, C J. and Pakenham Walsh, J) where it was held that the withdrawal of the suit against the sons does not exonerate them from liability under the pious obligation rule.

As the question now under discussion may perhaps arise again we would emphasise what the Privy Council actually decided in *Raja Ram* v *Raja Baksh Singh*[1]. There two members of a joint Hindu family, Badri Singh and Chandika Singh, executed a mortgage in favour of the appellant On the 25th August, 1930, the mortgagee brought a suit to enforce the mortgage By that time Badri Singh had died, but his two sons and five grandsons were joined as defendants as his legal representatives The grandsons were dismissed from the suit A decree was obtained against the other defendants and in the execution proceedings which followed the decree-holder sought to realise the interests of the grandsons in the hypotheca as well as the interests of the sons The Privy Council held that the grandsons' interests could not be sold because they had been dismissed from the suit Their Lordships, however, were careful to indicate that if the suit had been brought during the lifetime of Badri Singh and judgment recovered against him, the position would have been different

Their Lordships said

"If the debt in question was not contracted for purposes regarded as immoral by the Hindu law, and if the respondents, being grandsons of Badri Singh, were liable therefor to the extent of their interest in the joint family property, then the Subordinate Judge's decree of 13th May, 1931, was erroneous The appellant should have appealed therefrom, claiming that, instead of dismissing the suit as against the respondents, the Subordinate Judge should have given decree against them in like manner as against defendants 1 to 3, namely, as representatives of Badri Singh for a sum to be realised out of any property of Badri Singh come to their hands Such a decree passed in accordance with section 52 of the Code of Civil Procedure would have attracted the operation of section 53, and the respondents' interests in the joint property would have been liable to attachment under the decree notwithstanding that such interests were not 'property of the deceased ' in the strict meaning of those words The same result might have been attained in more ways than one had the appellant recovered judgment against Badri Singh in his lifetime But the interests of the respondents cannot be regarded as property of their deceased ancestor come to the hands of their coparceners, defendants 1 to 3, or any of them "

The important sentences so far as the question under discussion is concerned are the last two The decision in *Raja Ram* v *Raja Baksh Singh*[1] turned on the fact that the suit had not been brought during the lifetime of the grandfather

In *Venkatarangareddi* v *Chinna Sithamma*[2] a new situation arose A decree for mesne profits had been obtained against a Hindu father and his undivided sons, but the decree-holder had allowed it to become time barred The father was precluded from raising in execution proceedings the plea of limitation by reason of a previous order passed against him alone As the decree was enforceable against the father the decree-holder sought to execute it against the shares of the sons also by reason of the pious obligation rule The learned Judges (Wadsworth and Patanjali Sastri, JJ) considered that the matter was no longer one of Hindu law but was one which was governed entirely by the Code of Civil Procedure. They took pains to distinguish the case from *Periaswami* v *Vaithilingam Pillai*[3], *Doraiswami* v *Nagaswami*[4] and *Krishnan* v *Sami*[5] but considered that the last mentioned case was only intended to apply to cases where the creditor's suit against the sons has been dismissed " as withdrawn " without any adjudication , expressed or implied, on his claim against them We are not inclined to accept such a limited construction of the judgment in *Krishnan* v *Sami*[5] (which I delivered) We agree, however, that if the dismissal of the sons from the suit can be read as amounting to a decision by the Court that their interests in the family property are not liable for the debt, the pious obligation rule cannot be applied against them in execution of the decree obtained against the father Much depends on the circumstances under which the dismissal takes place Notwithstanding that the rule has been

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1 (1938) 1 M L J 41 I L.R 13 Luck 61 (P C)
2 (1941) 1 M L J 270
3. (1937) 47 L W 60
4 A I R 1929 Mad 898
5 (1940) 1 M L J 363 I L R (1940) Mad. 815

described as archaic, it is still very much a rule of Hindu law, and, as has been pointed out on other occasions, the Court is bound to give effect to it.

As the present case falls within *Krishnan* v *Sami*[1], the appeals must be allowed and the order of the District Munsiff restored with costs throughout, payable by the first respondent

V P S. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE CHANDRASEKHARA AIYAR

Somepalli Mutyalu . *Appellant**

v

Chittineni Veerayya and others *Respondents.*

Evidence Act (I of 1872), section 92—Scope of prohibition under—Doctrine of part performance under section 53-A, Transfer of Property Act—Proof aliunde *of consideration—If prohibited*

The prohibition in section 92 of the Evidence Act is only as regards evidence sought to be adduced for the purpose of contradicting, varying, adding to or subtracting from the terms of a contract. So long as the passing of consideration is not a term of the contract, evidence adduced to show that it did pass, even though the contract does not recite it, is not within the scope of the prohibition in section 92 Where a letter evidences the terms of a contract under which possession of land is supported on the basis of part performance, if the contract does not recite the consideration for the transfer, there is no prohibition to proof *aliunde* of the consideration

Appeal against the decree of the Court of the Subordinate Judge, Bapatla, in A S No 131 of 1943, preferred against the decree of the Court of the District Munsiff of Bapatla in O S No 289 of 1941

K S Desikan and *J Sitamahalakshmi* for Appellant.

B. Sitarama Rao and *B Somanatha Rao* for Respondents.

The Court delivered the following

JUDGMENT —The plaintiff, who brought the suit to recover a plot of land, is the appellant in this second appeal Both the lower Courts dismissed his suit on the ground that he gave the letter, Ex D-1, on 5th December, 1938, to the first defendant, stating that he had no connection whatever with the said property thereafter and that the first defendant can himself enjoy the property which had been given to his wife, the sister of the first defendant, by the father under a deed of gift in the year 1933 After this letter, the first defendant has been in possession of the property all along. Both the Courts have found that this letter was preceded by a mediation as the result of which the first defendant gave up a claim to recover a sum of Rs 350 from the plaintiff, who in his turn agreed to give up his interest in this property which belonged to his wife, she having got it from her father They applied the doctrine of part performance against the plaintiff

Mr Desikan for the appellant contends that the doctrine does not apply because section 53-A of the Transfer of Property Act requires two things, namely, (*a*) a contract to transfer for consideration and (*b*) a writing evidencing the contract indicating with reasonable certainty the terms necessary to constitute this transfer both of which conditions according to him, are absent in the case before us

The letter mentions no consideration and it is urged that proof *aliunde* cannot be given in support of it, as section 92 of the Evidence Act prohibits such proof. *Adityam Iyer* v *Ramakrishna Iyer*[2] and *Krishnayya* v *Mahomed Galeb Saheb*[3] are relied on in this connection But both these cases have no application *Adityam Iyer* v. *Ramakrishna Iyer*[2], is a case of a sale where the price is a term of the contract itself and it was therefore held that no evidence could be adduced to vary it The other case is again one where it was held that, though it was open to a party to prove want of consideration or failure of consideration, or a difference in the kind of consideration, it was not open to him to prove a variation in the amount of consideration.

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1 (1940) 1 M L J 363 I L R (1940) Mad 815

* S A No 60 of 1945 5th February, 1946.

2 (1913) 25 M L J 602 I L R 38 Mad 514 3 (1929) 58 M L J 240.

Whether the decision in *Adityam Ayer* v *Ramakrishna Ayer*[1], is still good law after the decision of the Privy Council in *Hanif-un-nissa* v *Faiz-un-nissa*[2], was doubted in *Ramaswami Chettiai* v *Lodd Govindoss Krishnadoss*[3], where it was pointed out that if a party could under proviso (1) to section 92 of the Evidence Act prove want or failure of consideration, it would be open to the opposite party to prove that the consideration recited in the deed or some other kind of consideration existed in support of the contract While it is true that for a relinquishment of this kind there should be consideration for its enforcement, it is equally clear that the consideration is not a *term* of the contract The prohibition in section 92 is only as regards evidence sought to be adduced for the purpose of contradicting, varying, adding to or subtracting from, the *terms* of a contract So long as the passing of consideration is not a *term* of the contract, evidence adduced to show that it did pass, even though the contract does not recite it, is not, within the scope of the prohibition in section 92

Moreover, I am not able to see why proviso (2) should not apply to this case. The document is silent on the subject of consideration and what is stated now, namely, that the first defendant gave up a claim for Rs 350 which he had against the plaintiff, is not in any way inconsistent with the terms of the letter, Ex D-1. The fact that the abandonment of the claim is postulated as the *quid pro quo* for the relinquishment does not make the transaction one of sale *Madam Pillai* v *Badrakali Ammal*[4] It remains a relinquishment nonetheless—a relinquishment supported by consideration and not one without consideration, merely because the letter does not refer to the consideration

As regards the other ground that the terms should be capable of being ascertained with reasonable certainty from the writing itself and that this is not a case where the terms could be so ascertained, there is no substance in it at all. The only term is that the plaintiff agreed that from that date onwards he had no more connection with the property and that it should be enjoyed by Veerayya, the first defendant, and this is found explicitly stated in the letter, which contains nothing else to create confusion or to raise any doubts as to what the terms might possibly be

I am happy to find that the law as I understand it is against this plaintiff. Otherwise, we shall be conniving at, if not actively encouraging, the perpetration of gross dishonesty The second appeal is dismissed with costs (No leave)

K S *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE WADSWORTH AND MR JUSTICE RAJAMANNAR.

Periakaruppan Chettiar .. *Appellant**

v

Venugopal Pillai and others .. *Respondents*

Mortgage suit—Preliminary decree modified in appeal—Final decree by trial Court pending appeal—No fresh final decree or amendment of the original final decree—Decree-holder's right to execute the decree as modified on appeal—Civil Procedure Code (V of 1908), sections 47 and 96—Order on miscellaneous petition in execution—Appealability

A preliminary decree was passed in a mortgage suit and the appellant who was a puisne mortgagee and a party to the suit preferred an appeal the result of which was a reduction in the amount payable

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1 (1913) 25 M L J 602 I L R 38 Mad 514

2 (1913) 21 M L J 1126 L R 38 I A 85 I L R 33 All 340 (P C).

3 (1925) 49 M L J 414

4 (1922) 42 M L J 410 I L.R 45 Mad 612 (F B)

*A A O No 601 of 1944 29th January, 1946

under the decree Pending appeal the trial Court passed a final decree on the basis of the preliminary decree passed by it After the decision of the High Court, the decree-holder filed an execution petition with a miscellaneous application for an amendment of the execution petition by substituting the amount payable according to the preliminary decree as modified by the High Court in place of the amount fixed by the preliminary decree of the trial Court In an appeal against an order allowing the petition, it was contended that as there was neither a fresh final decree nor a modification of the original final decree in the light of the appellate decree, the decree-holder by his omission to adopt either of the courses lost all rights under the original final decree A preliminary objection was raised that no appeal lay against the order in the miscellaneous application

Held, overruling the preliminary objection that an order in execution proceedings deciding any dispute between the parties affecting substantive rights can form the subject-matter of an appeal under sections 47 and 96 of the Civil Procedure Code

Neither the fact that the preliminary decree passed by the trial Court was varied by the High Court and subsequent to the date of the decree of the High Court there was no fresh final decree, nor the fact that there was no modification of the original decree passed by the trial Court would deprive the decree-holder of his rights to proceed in execution of his decree.

Veerankutty v *Koyakutty*, (1939) 2 M L J 86 . I.L R (1939) Mad 828, applied , *Balakrishnayya* v *Linga Rao*, (1943) 1 M L J. 198 I.L R (1943) Mad 804 and *Gajadhar Singh* v *Kishan Jiwan Lal*, (1917) I L R 39 All 641 (F B), distinguished

Appeal against the order of the District Court, South Arcot, at Cuddalore, dated 29th February, 1944, in C M P No 85 of 1943 in O S No 23 of 1928

T E Ramabhadrachariar for Appellant

T K Srinivasathathachariar for Respondents

The Judgment of the Court was delivered by

Rajamannar, J—This appeal arises out of an order passed by the learned District Judge of South Arcot in proceedings in execution of a mortgage decree in O S No 23 of 1928, on the file of his Court A preliminary decree was passed on 4th May, 1929, and the defendants were given three months time to pay, that is, till 4th August, 1929 The 8th defendant who is the appellant before us was a puisne mortgagee and a party to the suit as such The preliminary decree was for a sum of Rs 6,905-13-0 The 8th defendant (the appellant) preferred an appeal to the High Court with regard to the claim for interest and that appeal (A S No 175 of 1930) was allowed by this Court on 26th November, 1934 The result was a reduction of the amount payable to Rs 6,112-8-2 Pending appeal as further proceedings in suit had not been stayed, the trial Court passed a final decree on 23rd September, 1933, on the basis of the preliminary decree passed by it on 4th May, 1929 After the decision of the High Court in A S No 175 of 1930, the decree-holder filed an execution petition on 23rd September, 1936, and again another petition in 1939 and finally on 31st March, 1942, he filed E P No 52 of 1942 for further proceedings in execution by bringing the mortgaged properties to sale Along with the execution application, he filed a miscellaneous application No 85 of 1943 for an amendment of the execution petition by substituting in columns 8 and 11 the amount payable according to the preliminary decree as modified by the High Court in place of the amount fixed by the preliminary decree of the trial Court The learned District Judge allowed both the applications and adjourned the execution petition for further steps The present appeal purports to be filed against the order in M P No 85 of 1943

A preliminary objection was taken on behalf of the respondents that no appeal lay against the order in the miscellaneous petition We do not consider that there is any substance in this objection It has been held by this Court over and over again that an order in execution proceedings deciding any dispute between the parties affecting substantive rights can form the subject-matter of an appeal under sections 47 and 96 of the Civil Procedure Code In this case the order did decide that the decree-holder was entitled to proceed with the execution of his decree The present appeal can be understood to be an appeal against the order allowing the decree-holder to proceed with the execution in which case an appeal will certainly lie We overrule the preliminary objection

The learned advocate for the appellant contended that the decree-holder was not entitled to proceed to execute his decree because the preliminary decree passed by the trial Court in 1929 was varied by the High Court in 1934 and subsequent to the date of the High Court decree there was neither a fresh final decree nor a modification of the original decree passed by the trial Court in 1933 According to him the result of this omission on the part of the decree-holder to pursue either of the two courses is to deprive him completely of all rights under the final decree of 1933 For this position he relied mainly on the decision of a Bench of this Court reported in *Balakrishnayya* v *Linga Rao*[1] In that case the suit was instituted by a mortgagee for the balance due on a mortgage executed in his favour by the husband of the first defendant in the suit There were however on the date of the institution of the suit, numerous other defendants in possession of portions of the mortgaged properties under alienations effected subsequent to the mortgage The trial Court passed a preliminary decree in which it exonerated the fourth defendant from the decree The plaintiff preferred an appeal to the High Court and the High Court on 8th May, 1934, modified the decree of the lower Court in certain particulars *Inter alia* the High Court set aside the dismissal of the suit as against the fourth defendant and granted a decree to the plaintiff against the properties in possession of the fourth defendant also and provided for the payment of the value of improvements effected by him. While the appeal was pending in the High Court, the decree-holder applied to the trial Court and obtained a final decree for sale on 3rd October, 1927 After the decree of the High Court, the decree-holder filed an execution petition and it appeared from the columns therein that the date of the decree which he was seeking to execute was given as the date of the decree of the High Court in the appeal against the preliminary decree The learned Judges, Krishnaswami Aiyangar and Kunhi Raman, JJ , held that it was difficult to maintain that the decree of the High Court can be regarded as itself a final decree capable of execution They pointed out that the contents of the columns of the execution petition suggested that what the decree-holder was seeking to execute was the decree of the High Court This decision which certainly can be justified on the facts cannot help the appellant here In the present case, admittedly what the decree-holder was seeking to execute was the final decree. No doubt there are observations in the judgment of Krishnaswami Aiyangar, J , which appear to suggest that in a case where the appellate Court modifies in any way a preliminary decree passed by the trial Court and pending appeal a final decree has been passed by the trial Court, it might be necessary for the decree-holder either to apply for a fresh final decree or to have the final decree already passed suitably amended by incorporating the modifications But the learned Judges did not decide this point as they thought it was not necessary They also naturally did not proceed to discuss the further question that even assuming some modification had necessarily to be incorporated in the final decree already passed, what was the course indicated by the Code and if any questions of limitation would arise in respect of an application on that behalf But the *ratio decidendi* of the case before them was, as we understand it, that the decree-holder therein was not purporting to execute the final decree which had been passed by the trial Court but the preliminary decree as modified by the High Court This, of course, he was not entitled to do and this is not what the decree-holder in the present case is seeking to do The decision of the Full Bench of the Allahabad High Court in *Gajadhar Singh* v *Kishan Jiwan Lal*[2] has no relevancy for the present discussion because in that case there was no final decree obtained in pursuance of the preliminary decree passed by the trial Court There was an appeal from the preliminary decree and the question was when time began to run for an application to obtain a final decree Their Lordships held that the starting point of limitation would be the date of the appellate decree and not the date of the decree passed by the trial Court

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1 (1943) 1 M L J 198 I L R (1943) Mad 804.   2 (1917) I L R 39 All 641 (F B).

We consider that the present appeal has to be decided by an application of the principle underlying the decision of another Bench of this Court to which one of us was a party in *Veerankutty* v *Koyakutty*[1] In that case there was a preliminary decree in a mortgage suit passed by the trial Court on 21st July, 1925 There was an appeal therefrom, but pending the appeal a final decree for sale was passed on 9th November, 1925 The appeal against the preliminary decree was dismissed on 16th March, 1927. On 15th March, 1930, the decree-holder applied for execution of the final decree passed in 1925 Two objections were taken One was that the execution application was barred by the law of limitation as it had been filed more than three years after the passing of the final decree This objection was overruled and a consideration of this objection need not detain us as it does not arise in this case The other objection was that the final decree already passed was not executable and that an application for a fresh final decree or an amendment of the original decree was necessary before the decree-holder could proceed with the execution This objection was also overruled The learned Judges distinguished the ruling of the Judicial Committee in *Jowad Hussain* v. *Gendan Singh*[2] which affirmed the proposition laid down in *Gajadhar Singh* v *Kishan Jiwan Lal*[3] on the ground that the question which fell to be considered was not under consideration in those cases and say

"The fact that an appeal was preferred against the preliminary decree did not prevent the Court from passing the final decree . That decree remains binding and in full force until set aside The preliminary decree was confirmed on appeal and therefore did not affect the validity of the final decree which had been passed "

The learned advocate for the appellant sought to distinguish this decision on the ground that it dealt with a case of the affirmance of the trial Court's decree by the appellate Court and a different rule should obtain when the appellate Court modifies to any extent the preliminary decree passed by the trial Court We fail to see any ground for making this distinction On principle we do not see why, if in spite of the fact that certain modifications would be perforce necessary to be made by reason over of the affirmance by the appellate Court of the preliminary decree passed by the trial Court, such as for instance with regard to the costs of the appellate Court, the old decree could be executed, it should be different when the modifications are in respect of other particulars such as the amount payable, or the parties or the properties against whom the decree should run It should not be overlooked that the real object of a final decree for sale under Order 34, rule 5 of the Civil Procedure Code is to give a direction that the mortgaged property or sufficient part thereof should be sold for the purpose of realising the amount due to the mortgagee The final decree itself does not fix the amount payable. Nor does it specify the party and properties against which the decree has to be put into execution All these things are done by the preliminary decree The form given in Appendix D to the Code of Civil Procedure for a final decree for sale is in these terms

"Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of , and the application of the plaintiff dated the day of , for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the mortgage , It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property "

If this function of a final decree for sale is borne in mind it becomes clear that on principle there ought not to be any distinction between a case of the affirmance and a case of variation of the preliminary decree by an appellate Court The final decree passed in the case, if it was passed before the disposal of the appeal against the preliminary decree, would, in our opinion, automatically operate on the preliminary decree as affected by the decision of the appellate Court It might be affected to a greater or lesser degree. The alterations which may be necessary

1 (1939) 2 M L J 86 I L R (1939) Mad 828
2 (1926) 51 M L.J. 781 L R. 53 I A 197 I L R 6 Pat 24 (P C)
3 (1917) I L R 39 All 641 (F B).

if they have to be made formally in the final decree already passed, would be practically the same whether the appellate decree is one of affirmance or of variation. In fact the words "preliminary decree passed in this suit" which occur in any final decree for sale ought to be understood to mean the preliminary decree as affected by any appellate decision in cases where the preliminary decree is the subject of an appeal So read, we do not see any difficulty in holding that whether the preliminary decree is affirmed in toto or is varied to any extent or in any particular, the final decree could be executed with such modifications as may be necessary in the circumstances which might as well be made in the execution petition filed after the appellate decree

Considered from another aspect too, we think that there is no substance in the objection by the appellant It can be said that it is the duty of the trial Court which passes the final decree to carry out such modifications as may be necessary by reason of the decision of an appellate Court in an appeal against the preliminary decree when its attention is drawn to the necessity for such alteration by the decree-holder We do not think that so long as the decree itself has been kept alive, there can be a bar of limitation to an application of this sort Such application really calls upon the Court to carry out modifications which in law automatically take place in the final decree already passed before the decree of the appellate Court. No authority has been cited to us which lays down that an application of this sort should be filed within three years from the date of the decree of the appellate Court. Rankin, C J, pointed out in *Talebali* v. *Abdul Aziz*,[1] that the appellate Court when setting aside or varying the preliminary decree can and should give directions for setting aside or varying the final decree if the existence of the final decree is brought to its notice as in all cases it should be This clearly suggests that there is nothing in the Code which makes it incumbent on a decree-holder to make an application which would be governed by Article 181 of Schedule I to the Limitation Act to obtain any fresh relief The relief must be deemed to have been granted by the appellate Court itself in the appeal against the preliminary decree and the fact that appropriate modifications have to be made in the final decree already passed as a result of the decision of the appellate Court cannot arm the judgment debtor with an objection that any formal application for such modification is barred by time if made after three years from the date of the decree of the appellate Court. In our view the decision of the learned District Judge was right and the appeal is dismissed with costs of respondents 1 to 3

V P S *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE SOMAYYA.

Tallapragada China Venkatanarasimharao ... *Appellant**

v.

Yedida Panchamukhi Anjaneya Kumara Venkata Varaha Narasimhaswami being minor by mother and guardian Bapanamma and others .. *Respondents.*

Hindu Law—Adoption—Invalid adoption—Rights of adoptee in adoptive and natural family.

A person whose adoption is invalid is a perfect stranger to the adoptive family, and as such he can have no rights, not even the right of maintenance, in the adoptive family In such a case, however, the rights of the adopted son in his natural family remain unaffected

Bavani Sankara Pandit v *Ambabay Ammal*, (1863) 1 M H C R 363, *Lakshmappa* v *Ramava*, (1875) 12 Bom H C R 364, *Ramkishore Kedarnath* v *Jainarayan Ramrachhpal*, (1913) 25 M L J. 512 L R. 40 I A 213 I L R 40 Cal 966 (P C) and *Hari Das Chatterji* v *Manmatha Nath Mallik*, I L.R. (1937) 2 Cal 265, referred to

Appeal against the decree of the Court of the Subordinate Judge, Amalapuram, dated 30th October, 1944, in A S No 9 of 1944, preferred against the decree of the Court of the District Munsiff, Razole, in O. S No 115 of 1940, etc.

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1. (1929) I L R 57 Cal. 1013 (F B).

*S A No 307 of 1945, C M P No 1393 of 1945 and C. R P No 269 of 1945 — 7th February, 1946

P Somasundaram and *P Suryanarayana* for Appellant

V Parthasarathy for Respondent

The Court delivered the following

JUDGMENT —The first defendant is the appellant in this second appeal It arises out of a suit, O S No 115 of 1940, filed by the plaintiffs-respondents for a declaration that the properties in the suit are the properties of the second defendant-respondent 3 and that the third defendant's right which is a half share in the properties is available to his creditors, on whose behalf the two plaintiffs-respondents filed the suit The appellant China Venkatanarasimharao and the second defendant Kasturi Narasaraju are brothers and sons of one Chalapathi Rao Narasaraju was given in adoption to his sister Satyavatamma in May 1930 The properties in suit were purchased in the names of the two brothers while they were minors by their mother acting as their guardian in the year 1926 After the second defendant was given away in adoption into a family which is admitted to be a very wealthy one, the first defendant treated the property in question as solely his But there was trouble about the validity of the adoption and the adoption was finally declared to be invalid by this Court in A S No 126 of 1937 It had been declared invalid even by the lower Court and that judgment was upheld by this Court Meanwhile he seems to have got into financial troubles and there were a number of creditors of whom the plaintiffs-respondents are some The appellant filed O S No 267 of 1933 against one G Satyanarayanamurti, a lessee of the suit house for recovery of the house His brother Narasaraju was also made a defendant Later on, the adoptive mother of Narasaraju was also made a party In that suit the question was whether the suit property was the exclusive property of the plaintiff therein who is the first defendant here As the suit relating to the validity of Narasaraju's adoption was pending, O S No 267 of 1933, was being adjourned from time to time, and after the adoption was declared invalid, O S No 267 of 1933 was taken up for trial Narasaraju, the second defendant, got two additional issues raised

"9 Whether the second defendant reverted to all his rights in the natural family consisting of himself and the plaintiff in view of his adoption having been held invalid and if so, from what time ?

10 Whether the second defendant is entitled to a moiety of the suit property as alleged by him either as a joint purchaser or as a member of the family with the plaintiff"

When the case came on for trial, he absented himself and so did his advocate. Some evidence was taken from the plaintiff and the suit was decreed on the 14th December, 1939 The present suit was filed on 24th July, 1940, for a declaration that the decree in O S No 267 of 1933 was invalid, having been brought about by collusion on the part of the present first and second defendants The allegation is that large monies were owing by Narasaraju and that Narasaraju, finding that if he succeeded in that suit in getting a half share in the suit property, the creditors would proceed against it, made up with his brother and allowed the suit to go for default On the question of fact whether the decree in the prior suit was the result of collusion between the two brothers, we have the evidence of P W 3 who was the first defendant in the previous suit He is a member of the Bar and he deposes that on the last day when the previous suit came on for trial, the first defendant went to him and stated that he and his brother Narasaraju had settled that matter, that Narasaraju and his adoptive mother would not appear at the trial and that he and the witness who was the first defendant therein might have their disputes settled This evidence has been accepted by both the Courts and on that evidence it is clear that Narasaraju's abstention from appearing at the trial was clearly the result of some agreement between the two brothers That could only be for the reason that as there were a number of creditors who would be really benefited by Narasaraju's succeeding in the suit, the brothers thought that it would be better to allow the property to be decreed as the property of the first defendant, plaintiff in that suit, rather than have it established that Narasaraju had a half share in the property That being so, it is clear that the finding of the

lower Courts that the decree in O S No 267 of 1933 was obtained fraudulently and that it did not bind the creditors of Narasaraju, as correct

The next point urged by Mr P Somasundaram, the learned advocate for the appellant, is that the lower appellate Court has arrived at wrong conclusions on the questions whether the two brothers, the appellant and Narasaraju, were really divided in status before the date of the adoption and whether the property was purchased with the ancestral funds and was therefore the joint family property of the two brothers The lower appellate Court held that it was not proved that the property was acquired with the joint family funds and it was also held that the two brothers had become divided in status prior to Narasaraju's adoption Mr. P Somasundaram has filed some documents before me and he contends that the effect of those documents would be to show that the two brothers were joint and that the property was acquired with the ancestral funds of the family It is unnecessary to admit them, because I shall now proceed on the footing that the two brothers were joint in status and that the property was acquired from the joint family funds and was therefore the coparcenary property of the joint family Even on this footing the decree of the lower appellate Court must be upheld

The effect of an invalid adoption on the rights of the adoptee has been discussed from very early times In *Bavani Sankar Pandit* v *Ambabay Ammal*[1], it was held that in reason and in good sense it would hardly seem a matter of doubt that where there is no valid adoption, in other words, where no adoption has taken place, no claim of right in respect of the legal relationship of adoption can properly be enforced at law, and that the rights of the adopted son in the natural family remain unaffected This view was followed by Westropp, C J, in *Lakshmappa* v. *Ramava*[2] In *Vaithilingam* v *Murugaiyan*[3], it was held that an invalid adoption does not *per se* destroy the adoptee's rights in the natural family The Bombay High Court has taken the same view in *Dalpat Singji* v *Raisingji*[4]. In Calcutta there are two decisions One is in *Sajanisundari Dasi* v *Jogendra Chandra Sen*[5], where it was held that in the case of an invalid adoption, the adopted son acquired no rights in the family of adoption and lost none in the family of his birth The question was again considered by the Calcutta High Court in *Hari Das Chatterji* v *Manmatha Nath Mallik*[6], and there is an elaborate discussion of this question and the decision followed the earlier decision referred to above There is only one early decision of the Calcutta High Court reported in *Rajcoomaree Dossee* v. *Nobocomor Mullick*[7], where a contrary view had been expressed. The learned Judges dealt with that decision, then referred to the various decisions of Madras, Bombay and other Courts and held that the correct view is that the adoptee does not lose his rights in the natural family if the adoption is invalid The contrary view was expressed by Mr Mulla in the earlier edition that a person whose adoption is invalid has still some rights in the adoptive family by way of maintenance That this view cannot be upheld is clear from the observations of the Judicial Committee in *Ramkishore Kedarnath* v *Jainarayan Ramrachhpal*[8] where they observed thus

"The basis of the suit is that the adoption of Jainarayan was wholly invalid, in which case he was in the view of the law an absolute stranger"

The correct view is that a person whose adoption is invalid is a perfect stranger to the adoptive family That being so, he can have no rights, not even the right of maintenance in the adoptive family In the 9th edition of Mr Mulla's Principles of Hindu Law, the view expressed in the earlier decisions is noticed and paragraph 510, as it now stands, reads thus ·

"As a general rule it may be laid down that where there has been an adoption in form, but such adoption is invalid, the adopted son does not acquire any rights in the adoptive family, nor does he forfeit his rights in his natural family"

1 (1863) 1 M H C R 363
2 (1875) 12 Bom H C R 364, 397
3 (1912) 23 M L J 189 I L R 37 Mad 529
4 (1915) I L R 39 Bom 528
5 (1930) I L R 58 Cal 745
6 (1937) 2 Cal 265
7 Boulnois 137 (143)
8 (1913) 25 M L J 512 L R 40 I A 213: I L R 40 Cal 966 (P C)

Reference is made to the decisions in *Bavani Shankara Pandit* v. *Ambabay Ammal*[1], and other cases. In Mayne's Hindu Law, 10th edition, the same view is expressed at page 284. In fact this view was expressed by Mr Mayne in all the earlier editions In the result, I hold that even taking it that the two brothers were members of a joint family and that the property was acquired with the joint family funds and was therefore the joint property of the two, the invalid adoption of Narasaraju did not take away the right of Narasaraju to a share in the joint family properties That being so, the creditors have a right to proceed against that share and the decree in the previous suit is obviously not binding on them, having been brought about by collusion between the two brothers

The second appeal fails and is dismissed with costs. The civil revision petition is dismissed; no costs No leave

B V V *Appeal and revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE WADSWORTH AND MR JUSTICE PATANJALI SASTRI.

Veluswami Goundan *Appellant**

v

Dandapani minor by next friend and mother Govindammal and others *Respondents*

Hindu Law—Will—Charitable bequest—Provision for gurupuja *and* annadhanam *at* samadhi *and daily worship at temple over the tomb—If one for a public charitable purpose—Validity—Bequest for worship of God without specifying particular deity—Validity—Doctrine of* cypres*—Applicability*

The performance of *gurupuja* at the *samadhi* or tomb of a person, however pious, is not a public charitable object recognised by Hindu Law Where a temple is only an adjunct to the tomb, a dedication of property for daily worship, *gurupuja* and annual *annadhanam* at such temple will be wholly unlawful and the gift invalid

Draviasundaram v *Subramania*, (1945) 1 M L J. 328 · I L R (1945) Mad 854, applied

Though there are various deities worshipped by Hindus holding different tenets these are only personifications of what are believed to be the various attributes or cosmic manifestations of the one Supreme Being A gift by a Hindu for the "worship of God" is not invalid For determining the particular deity for whose benefit the endowed property is to be held the Court can ascertain the sect to which the donor belonged, the tenets which he held, the doctrines to which he was attached and the deity to which he was devoted and arrive by such means at his presumed intention in regard to the application of the property

Venkatanarasimha Rao v *Subbarao*, (1922) I L R 46 Mad 300, distinguished , *Attorney General* v *Pearson* (1817) 3 Mer 353 (409) 36 E R 135 and Re *Louisa Kenny, Clode* v *Andrews*, (1907) 97 L T. 130, referred to.

In any case, a gift for the "worship of God," discloses a general charitable intention and the Court can apply the doctrine of *cypres* upholding the gift as a public trust, even where it is not possible to ascertain with any degree of certainty how the donor intended the trust to be carried out

Appeals against the decrees of the Court of the Subordinate Judge of Coimbatore, dated 30th November, 1943, in O S Nos 53 and 180 of 1942.

K. V Ramachandra Aiyar and *T N Sundaresa Aiyar* for Appellants

T. V Muthukrishna Aiyar and *P S Sarangapani Aiyangar* for Respondents

The Judgment of the Court was delivered by

Patanjali Sastri, J—These appeals arise out of a suit and a cross suit brought to establish the rival claims of the parties to certain immoveable properties left by one Ramaswami Goundan who died in 1941. The first plaintiff who is a minor represented by the second plaintiff, his mother, acting as his next friend, brought O. S. No 53 of 1942, in the Court of the Subordinate Judge of Coimbatore claiming that a *dharmasasanam* (or deed of charitable endowment) executed by Ramaswami was a sham and nominal transaction and that he as the undivided son of Ramaswami succeeded to the properties comprised in the deed by survivorship, and, in the alternative, that he was the only person entitled to manage the properties on behalf of the charity in case the deed was upheld as a valid dedication He accordingly

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1 (1863) 1 M.H.C.R. 363.

* Appeals Nos. 85 and 398 of 1944. 11th January, 1946.

prayed for a declaration to that effect and for sundry other consequential reliefs which it is unnecessary to detail here The son of Ramaswami by his first wife was called as first defendant to the suit and he filed a written statement as the sole contesting defendant pleading *inter alia*, that the deed of endowment created a valid trust intended to be operative and was given effect to and acted upon by Ramaswami himself before his death, that the second plaintiff was not the lawfully wedded wife of Ramaswami and the first plaintiff was not born to him and that he (first defendant), though divided from his father, was entitled, as the only legitimate son of Ramaswami, to manage the trust properties on behalf of the trust and perform the services specified in the deed On practically the same allegations he brought O. S. No 760 of 1941 in the Court of the District Munsiff, Tirupur, for injunction and other reliefs This suit was transferred to the Court of the Subordinate Judge, Coimbatore, where it was numbered as O S No 180 of 1942, and was tried along with the other suit by consent of parties It will be convenient to refer to the parties as they are arrayed in O. S No 53 of 1942.

The learned Subordinate Judge has found (1) that the second plaintiff was lawfully wedded to Ramaswami Goundan and the first plaintiff was born to him, (2) that the *dharmasasanam* (Ex P-3) was executed by Ramaswami as a nominal transaction to screen the properties against the claims of his illegitimate son by his concubine, Kannammal, but was intended to be operative to the extent of charging the properties with an annual expenditure of Rs 150 for the performance of the services specified therein and (3) that the properties devolved on the first plaintiff as the undivided son of Ramaswami subject to the trust and the second plaintiff was entitled to manage the properties on his behalf The learned Judge accordingly passed a decree in favour of the plaintiffs in O S. No. 53 of 1942, and dismissed O S No 180 of 1942, making the first defendant liable for costs in both the suits. From the said decrees the first defendant has preferred these appeals and the plaintiffs have preferred a memorandum of cross-objections claiming that the deed Ex. P-3 was wholly nominal and inoperative

Mr. Viswanatha Sastri appearing for the appellant did not attack the finding of the Court below regarding the legitimacy of the first plaintiff But he urged that the finding of the learned Judge that the transaction evidenced by Ex P-3 was partly nominal and partly operative was opposed to the evidence in the case, besides being self-contradictory and unintelligible He contended that the deed operated and was intended to operate as a genuine dedication of the entire properties to the trust specified therein and that the deed was acted upon by Ramaswami himself who was performing the services applying the income of the properties thereto. He further submitted that on a true construction of its terms relating to the future conduct of the services the appellant as well as the first plaintiff was entitled as the "*santhathi*" of Ramaswami to participate in the management of the properties and performance of the trusts On the other hand, Mr Muthukrishna Aiyar for the plaintiffs-respondents 1 and 2, while maintaining that Ex. P-3, was a wholly nominal and colourable transaction brought about for ulterior purposes, attacked its validity also on legal grounds .

The deed runs as follows :

"Deed of charity of *annadhanam* (free distribution of food) in connection with the *gurupooja* of Komarapalayam Marappa Goundar Samadhi (tomb)—value Rs 5,000.

Deed of charity brought about on the 21st September, 1936, by me, Ramaswami Goundar, son of Marappa Goundar, Vellala, agriculturist, residing at cusba Komarapalayam village, Palladam Taluk

At the time when my deceased father Marappa Goundar was alive, that is, during his last days he had left me instructions that as soon as he left this mundane world he should be buried in the field G S No 59/1, situated in the said Komarapalayam, which is a patta land belonging to me, and that a tomb should be erected and also a temple over it, in pursuance of the same, till now I am conducting *pooja* (worship) and *neivedyam* (offering) every day, thrice a day, and every year on the day of Pooradam Nakshatram in the month of Avani celebrating the gurupooja (worship of the preceptor) and also doing *annadanam* etc , to the devotees incurring an expenditure of about Rs 150 Since I am of the opinion that after my lifetime also the said services should be continued to be carried on hereditarily in the above manner, I hereby provide that out of the joint family properties, which belong to me both as ancestral and self-acquired properties, excluding the share which has fallen to my only son, Veluchamy Goundan, as per the deed of partition which was effected between him

and myself, with the income derived from the undermentioned properties worth Rs. 5,000, which relate to my share, I shall be performing the pooja, etc , aforesaid during my lifetime ; that after my lifetime the said services shall be carried on properly by my descendants with the help of the income derived from the undermentioned properties without myself or the said persons subjecting them to any hypothecation, usufructuary mortgage or sale, and that in case they were subjected to the encumbrances aforesaid it shall not be valid To this effect is the deed of charity brought about by me out of my own free will "

It is urged that the deed is invalid as a dedication to a public charity as the performance of *gurupooja* at the *samadhi* or tomb of a person however pious is not a charitable object recognised by the Hindu Law, and reliance is placed on the recent decision of this Court in *Draviasundaram* v *Subramania*[1] There a testator provided in his will that a *matam* should be built for keeping him in *samadhi* with a Sivalingam installed therein, that daily *pooja*, *mandala pooja* and the yearly *gurupooja* should be conducted permanently and that poor mendicants should be fed during the *mandala pooja* and the yearly *gurupooja* The Court held, following *Kunhamutty* v *Ahmed Musaliar*[2], that the building of a tomb and its maintenance was not a charitable object and that, the *matam* over the tomb being only an adjunct of the tomb even though daily worship was to take place there, the whole provision was unlawful and the gift was invalid The provisions of Ex P-3 set out above are closely similar and the principle of the decision must therefore apply.

Mr Viswanatha Sastri seeks to distinguish the present case by stressing the use of the word " temple," and argues that the worship therein three times a day with offerings of " *neivedyam* " for which the deed makes provision is a distinct charitable object, and that even if the direction for the performance of *gurupooja* at the *samadhi* and the incidental feeding of the poor is unlawful, the gift which is a composite endowment should be upheld in its entirety as a valid dedication of the " temple " in which a Sivalingam is kept and worshipped We are unable to accept this contention In the first place, there is no reference in the deed to any Sivalingam installed in the so-called temple, and, although the photographs, Ex. D-2 series show the existence of a Sivalingam there, it appears from the evidence of the appellant that the lingam was brought from Kasi and installed there sometime in 1937 when the earliest photo Ex D-2 was taken The daily worship and offering of " *neivedyam* " said to have been conducted by Ramaswami Goundar before the execution of the deed in September, 1936, could, therefore, be taken to have related only to the *samadhi* of his father It is indeed admitted by the witnesses called for the appellant that the pooja is done to the *samadhi* The learned Subordinate Judge after discussing the evidence has recorded his conclusion thus .

"I should think that there is a lingam-like stone with avadai too perhaps, kept on the *samadhi* but it has not been consecrated and no pooja is done therefor "

We agree with this finding It is to be noted in this connection that in the case referred to above the testator provided for the daily *pooja* of the *Sivalingam* to be installed in the *matam*, and nevertheless the whole bequest was held invalid as the *matam* with the *lingam* was regarded as an adjunct of the tomb. In the present case it is clear from the evidence that the so-called temple is nothing more than a " zinc shed " over the *lingam* which is kept on the *samadhi*

Mr Muthukrishna Aiyar raised a further contention that even, if the " temple " were held to be a distinct and severable object of the dedication, it could only be regarded as a temple for the worship of God as no particular deity is mentioned in the deed, and that such an endowment in general terms would be void for uncertainty under the Hindu Law as Hindus worship numerous deities Reference was made in support of this view to *Venkatanarasimharao* v *Subbarao*[3], *Chandicharan Mitra* v. *Hariboladas*[4], *Phundanlal* v *Arya Prithi Nidhi Sabha*[5] The point did not directly arise in the case first mentioned where the question was whether a trust for " the spread of Hindu religion " was void for uncertainty In holding that it was, Spencer, J., referred to the decision of the Calcutta High Court in *Chandicharan Mitra* v. *Hari-*

1. (1945) 1 M L J 328 · I L.R. (1945) Mad 854.
2. (1934) 68 M L J 107 · I L R 58 Mad. 204.
3. (1922) I.L.R 46 Mad. 300.
4. (1919) I L R 46 Cal 951
5 (1911) I.L R 33 All 793

bola dass[1], where a Division Bench (Fletcher and Cuming, JJ.) laid down that under " the Hindu system of law " a general endowment for the worship of God without giving the name of the deity for whose benefit the endowment was to take effect was void for uncertainty. This proposition was based on the authority of a decision of the Allahabad High Court in *Phundanlal* v. *Arya Prithi Nidhi Sabha*[2]. That was a case where a person who was building a house intended to instal an idol therein on completion and, meanwhile, executed a deed of endowment in respect of certain other properties belonging to him in favour of " Sri Thakurji of the *thakurdwara* called after his name," appointing himself as the manager of the properties Subsequently, however, he was converted to the creed of Arya Samaj and conveyed the properties comprised in the deed of endowment as well as the house to the Samaj Owing, to the conversion, the donor did not instal any idol in the house which he had intended to convert into a *thakurdwara* After his death, the Samaj sued through its president for possession of the properties alleging wrongful dispossession by the defendants who pleaded that the plaintiff derived no title under the later conveyance as the donor had previously dedicated the properties to charity. Overruling the plea the learned Judges (Richards, C J., and Banerji, J.), observed :

"The question is whether, under these circumstances the gift which he made on the 30th of May, 1903, can operate as complete and *effectual* gift of the eight shops and can prevail as against the subsequent document of the 4th of February, 1905. If the dedication was *complete*, it is clear that he could not revoke it and make another gift We are of opinion that in the present instance the first dedication was not valid It was not a dedication to any particular deity which was subsequently to be installed in a temple It was a dedication to the thakurji in his thakurdwara without mentioning the thakurji to whom the property was dedicated. As we have already said, there was no thakurji and no thakurdwara, therefore the dedication was bad on the ground of uncertainty "

The formulation of the question for decision and the next few sentences in the passage quoted above would seem to indicate that all that the learned Judges meant to decide was that the donor having intended to dedicate the property to the idol of a deity (thakur) which he proposed to instal later in a particular house, which was under construction and having changed his faith before completing the construction and effecting the installation, there was no completed gift, in other words, that the deed disclosed an intention in the donor that the decision should take effect on the completion of the building as a *thakurdwar* and the installation of the idol therein There is a distinction between a gift qualified by a condition which is not fulfilled and a gift for vague and uncertain purposes. Both are ineffectual though for different reasons The learned Judges would seem to hold that the case before them came under the first category though it must be admitted they have in some places used language which may be understood to imply that it fell under the second. The decision is therefore of somewhat doubtful value as an authority for the proposition which the learned Judges of the Calcutta High Court deduced from it.

A gift for " the worship of God " has been held in England to be charitable and valid (*see* Tudor on Charities, 5th edition, page 32, citing *Attorney-General* v. *Pearson*[3]) and we are unable to discover anything in " the Hindu system of Law " which renders such a gift invalid. The learned Judges in the Calcutta case remark that unless the donor indicates the particular *thakur* for whose benefit the property is given the Court would be " unable to say for which of the Hindu deities the endower intended that the property should be held " With all respect, this reasoning seems to us to proceed on a fundamental misconception of Hindu theology. The notion that Hindus worship only particular deities and not one Supreme Being is not correct. It might seem pedantic to refer at length to Hindu scriptural texts to show that the idea of one God is a basic creed of the Hindu faith, but we may, perhaps, be excused, under the circumstances for referring to the well-known verse in the *Vishnusahasranamam*, often recited on various ceremonial occasions among Hindus, which says that " Vishnu, the one Supreme Being, the Great Soul and

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1. (1919) I L R. 46 Cal 951
2. (1911) I.L.R. 33 All 793
3. (1817) 3 Mer 353, 409 36 E.R 135.

the Ruler of the Universe, pervades the three worlds and protects countless beings of different species." (*Mahabharata, Anusasana Parva, Adhyaya*, 254, verse 142). This idea of one Supreme Being can, indeed, be traced back to Vedic times. The Rigveda, the earliest Hindu scripture extant, refers to the "one Being whom wisemen call by diverse names" (1—164—46) The same idea of the unity of God is reiterated in numerous other religious texts to which it is unnecessary to refer. That the conception of the so-called Trinity of the Hindu pantheon is functional in character will be seen from the invocation to Vishnu in Kalidasa's *Raghuvamsa* · "Thou art the Creator, the Upholder and the Destroyer of the Universe Obeisance to Thee in Thy triple form." (*i e*, Brahma, Vishnu and Siva) (10-16) There are doubtless various deities worshipped by Hindus holding different tenets but these are only personifications of what are believed to be the various attributes or the cosmic manifestations of the Supreme Being.

As regards the supposed inability of Courts to determine the particular deity for whose benefit the endowed property should be held, where no deity is named in the deed of endowment, it is sufficient to point out that in most cases the problem can be easily solved by ascertaining the sect to which the donor belonged, the tenets which he held, the doctrines to which he was attached and the deity to which he was devoted and arriving by such means at his presumed intention in regard to the application of the property It was observed by Lord Eldon in *Attorney-General* v *Pearson*[1], already referred to "where a body of Protestant Dissenters have established a trust without any precise definition of the object or mode of worship I know no means the Court has of ascertaining it except by looking to what has passed and thereby collecting what may, by fair inference, be presumed to have been the intention of the founders" (at page 410) (Cf Re *Louisa Kenny* ; *Clode* v. *Andrews*,[2]) In any case, a gift, for "the worship of God" discloses a general charitable intention and the Court can apply the doctrine of *cypres* upholding the gift as a public trust, even where it is not possible to ascertain with any degree of certainty how the donor intended the trust to be carried out. We accordingly reject Mr Muthukrishna Aiyar's contention that the gift to the temple under Ex. P-3 assuming it to be a distinct and severable dedication, is void under the Hindu law merely because Ramaswami Goundar has not specified the particular deity to be worshipped therein

As, howeever, we are of opinion, for the reasons already indicated, that the "temple" was not intended to be an independent object of bounty but is only an adjunct of the *samadhi* the whole dedication fails. In this view, it is unnecessary to enquire whether it was intended to be a genuine gift or a mere sham or how the right of management is to devolve

The appeals are dismissed with costs One advocate's fee The memorandum of objections directed against the declaration of a charge on the properties is allowed. No costs

K S *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI

Ayiri Parambil Chozmi and another .. *Appellant**

v.

Kolengot Devaswom Urlandar N Parameswaran Nambudiri and others .. *Respondents.*

Malabar Tenancy Act (XIV of 1930 as amended), section 20 (5)—Applicability—Property belonging to Devaswom—Competency of trustee to apply for eviction—Proof of necessity to cultivate.

Clause (5) of section 20 of the Malabar Tenancy Act is also applicable to the case of a Hindu idol or institution and the word "landlord" therein includes a trustee of a devaswom In such

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1. (1817) 3 Mer 353, 409 · 36 E R 135 2. (1907) 97 L T 130

* S. A. No. 1750 of 1944 and A A. A. O No 300 of 1944. 18th December, 1945

a case it is competent for the trustee to declare on behalf of the idol, of which he is the duly constituted trustee, that a certain property belonging to the idol is required for cultivation on behalf of the idol, and if he shows that his requirement is *bona fide* he is entitled, without reference to any other circumstance, to a decree for eviction against the tenant. In terms of the amended Act however it should be shown by the trustee that the Devaswom needs the holding *bona fide* for the purpose of raising crops or other produce for its own maintenance.

Appeal against the decree of the District Court, South Malabar, in A. S. No. 269 of 1943, preferred against the decree of the Court of the District Munsiff, Ponnani, in O. S. No. 48 of 1942, etc.

P. Govinda Menon for Appellant.

D. H. Nambudripad for Respondents.

The Court delivered the following

JUDGMENT.—The first and second defendants who are the appellants here, are the kanom tenants under the plaintiff, who is the jenmi. The plaintiff is an Uralan or trustee of a Devaswom and he sued in that capacity to evict the appellants from the kanom lands under section 20 of the Malabar Tenancy Act (herein called the Act). The ground for eviction that was urged in the plaint was that the property was required *bona fide* for cultivation on behalf of the Devaswom.

The appellants raised two main contentions. The first was that the plaintiff, being only a trustee, was not entitled to institute an action for eviction on behalf of an idol, which not being an animate or sentient being, could not have required the property for its own cultivation as provided under clause 5 of section 20 of the Act. The second objection was that, as a matter of fact, the land was not required for the purpose of cultivation *bona fide*. The learned District Munsiff found against the plaintiff with regard to both the objections and consequently dismissed the suit. He held that the plaintiff in seeking to evict the appellants was not actuated by good faith. He also observed that the plaintiff in his own private capacity was a wealthy person and hence there was no justification for his saying that he required this small piece of land, from which very little additional produce can be expected, for his own cultivation. He also referred to another circumstance. The plaintiff had, with reference to another piece of land forming part of the trust, instituted a similar suit for eviction, but apparently on settling terms with the tenant subsequently withdrew the suit. From this circumstance also the inference was drawn by the trial Court that the land in suit was not required by the plaintiff for his own cultivation. On appeal, the learned District Judge reversed the decree of the District Munsiff and found that an idol can cultivate its property through its agent, the trustee and that, in the present case, the trustee did require the property for cultivation on behalf of the idol. He also held that the requirement of the trustee was *bona fide* and in view of the decision of this Court in *Narikkal Chathan* v. *Kesavan Namboodri*[1], he decreed the plaintiff's suit for the eviction of the appellants. In that decision, it had been held by this Court that having regard to the language of clause (5) of section 20, if the landlord proved that he required the land for his own cultivation and that requirement was *bona fide* the landlord is entitled, without reference to any other circumstance to a decree for eviction against the tenant. The present appeal is brought against the order of the District Judge.

The same two questions have been pressed before me by Mr. Govinda Menon on behalf of the appellants. He has particularly stressed the first objection and contends that clause (5) of section 20 is intended for the sentient human beings and is not applicable to the case of a Hindu idol or an institution. This argument strikes me as being repugnant to the well-settled and recognised notions of Hindu religion and Hindu law. The idol, according to the Hindu law, is a juristic entity who can hold property and enjoy the same. If it can do so, it can lease out its properties or can cultivate its own properties, the only disability being that, being virtually in the position of a disabled person it has necessarily to exercise its acts of manage-

1. (1941) 2 M.L.J. 455 : I.L.R. (1942) Mad. 133.

ment or administration through an agent, *viz*, the trustee The real contention is that the idea of maintenance of an idol is inconsistent in the case of a being that is not animate. Even here, it seems to me that the argument overlooks the fact that a Hindu idol requires as large a measure of maintenance as a human being does. Maintenance, ordinarily, means the provision of food, raiment, lodging, etc, and all these are daily required, according to the ideas of Hindu religion, by an idol Next, distinction was sought to be made as between a public trust and a private trust. The learned District Judge has referred to that aspect of the matter, although I apprehend that he has not been quite accurate when he stated that in the case of a private temple the trustee would be practically the owner of the temple. So far as the fiduciary character of the trustee is concerned and so far as his representative capacity is concerned, there is essentially small difference between a trustee of a public trust and the trustee of a private trust and he is competent to declare on behalf of the idol of which he is the duly constituted trustee that a certain property belonging to the idol is required for cultivation on behalf of the idol. The question then is whether in the capacity of a trustee the plaintiff was competent to maintain this suit, because that is, in effect, the main argument of Mr Govinda Menon in this case His contention virtually is that as clause (5) of section 20 of the Act is worded, no trustee of a temple can ever exercise the privilege that is conferred under that provision. I am not in a position to agree with this sweeping argument As pointed out by the learned District Judge, the clause specifically confers that power upon every "landlord" and that expression has been defined in the Act to include a jenmi and "jenmi" in turn as defined in the Act would include a trustee Mr Govinda Menon contends that these definitions are inclusive ones and if from the context it appears that the concept of a trustee is incompatible with the particular provision, then it should be held that the word "landlord," for the purpose of that clause, does not include a trustee I see nothing in the context, which excludes expressly or by compelling implication the class of trustees from the expression "landlord" occurring in that clause If the Legislature intended to exclude the whole body of trustees from the benefit that they were conferring upon landlords under clause 5 of section 20, it would have done so expressly and, in the absence of any such direct exclusion, I am not prepared to incorporate such an exclusion in the clause by any process of inference or implication. This objection of the appellant must, therefore, be negatived

The next question bears upon a question of fact After the decision in *Narikkal Chathan* v. *Kesavan Namboodri*[1] was given, clause 5 of section 20 of the Act has been amended by Madras Act XXIV of 1945, which came into force on 11th December, 1945 As amended, section 20 (5) would read thus, so far as material to the present case :

"No suit for eviction of a kanomdar shall lie at the instance of his landlord except on the following grounds

(5) that the period of the kanom has expired and there has been no renewal and the landlord needs the holding *bona fide* for the purpose of raising crops or other produce for his own maintenance or for that of any member of his family, or tarwad, or tavazhi who has a proprietary and beneficial interest in the holding"

By section 4 of the amending Act this change has been given retrospective effect with the result that the provision as amended becomes applicable to the present case. In the plaint it was specifically contended in paragraph 9 that there were not sufficient funds in the Devaswom for the performance of "Kazhagam and Shanti" (temple service worship) and that, consequently, the defendants should be evicted and the property in their possession should be surrendered for *bona fide* personal possession and cultivation by the Devaswom This allegation was denied by the first and second defendants (the appellants) in their written statements. The issue that was settled for the trial of this question was whether the plaintiff requires the property *bona fide* for cultivation and the learned District Munsiff found that the plaintiff did not require the property *bona fide* for cultivation. Under the

1. (1941) 2 M.L J. 455 : I.L.R. (1942) Mad 133.

amended Act, the idea of requiring *bona fide* for cultivation has been displaced by the principle that the landlord should need the holding *bona fide* for the purpose of raising crops or other produce for his own maintenance. Since the amended Act had not come into force, and, the pre-amendment clause prevailed, the question that was tried was different. But now it will be necessary to try the issue that arises under the amended clause, *viz*, whether the plaintiff Devaswom needs the holding *bona fide* for the purpose of raising crops or other produce for its own maintenance. Since the parties had no opportunity to adduce evidence upon this particular issue and since there is no finding on it, the matter will have to be sent back to the trial Court for a fresh enquiry on this question and fresh disposal of the suit in accordance with its findings upon that issue, subject to the finding given in this judgment on the first objection raised by Mr. Govinda Menon.

The learned District Judge also considered the further question whether the trial Court was right in disallowing the revenue claim from 1896 to 1938-39 and agreed with the view taken by the trial Court on that question. There was no appeal or objection by the plaintiff with regard to that finding and hence it has become final That question is therefore no longer open.

In the result, the two appeals are allowed *pro tanto* and the suit and the application for renewal, which is the subject-matter of C M. S. A. No. 300 of 1944, are remanded to the trial Court for disposal according to law in the light of the directions given in the judgment. Costs throughout will abide and follow the result Court-fee will be refunded.

B.V.V. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT .—MR JUSTICE KUPPUSWAMI AYYAR.

T. S. Chockalingam Pillai and others *Petitioners.**

Madras Criminal Rules of Practice, rule 366 *and Criminal Procedure Code* (*V of* 1898), *Schedule II, last item—Expenses of witnesses—When payable by Government—Offence punishable under rule* 81 (4) *of the Defence of India Rules with imprisonment for three years or fine—If one not bailable for purposes of Schedule II of the Criminal Procedure Code*

Rule 366 of the Madras Criminal Rules of Practice specifically provides for the payment of expenses of witnesses by Government, in cases shown in the second schedule of the Code of Criminal Procedure as not bailable. In considering the question whether an offence punishable under rule 81 (4) of the Defence of India Rules is bailable or not, the maximum punishment awardable for the offence must be taken into account and as there is a possibility of the accused in such a case being awarded three years' imprisonment the case will come under the class "if punishable with imprisonment for three years and upwards but less than seven years" in last item of Schedule II of the Criminal Procedure Code and the offence is not bailable Accordingly a magistrate is not justified in treating such a case as one in which the accused has been charged with an offence which is bailable and refusing o pay the expenses of the defence witnesses

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Third Presidency Magistrate, of the Court of the Presidency Magistrates, Egmore, Madras, dated 20th November, 1945, in C C. No. 400 of 1945.

A. C. Krishnaswami and *T. R. Srinivasan* for Petitioners

The Crown Prosecutor (*P. Govinda Menon*) for the Crown.

The Court made the following

ORDER —The only point for consideration in this case is whether the Magistrate was justified in refusing to pay the expenses for the defence witnesses cited in C. C No. 400 of 1945 on the file of the Third Presidency Magistrate, Madras. The petitioner has been prosecuted in this case for an offence punishable under rule 81 (4) of the Defence of India Rules, which is punishable with imprisonment for a period of three years or fine. The Magistrate has held that this is a bailable

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* Cr R. C No 1054 of 1945. (Cr. R. P. No. 988 of 1945). 4th March, 1946

offence and that the accused should pay the expenses of the defence witnesses and that the Court will not pay the same. He cites a decision of the Nagpur High Court under the Defence of India Rules in *Ingley* v *Emperor*[1] for the position that offences punishable under the Defence of India Rules are bailable, and states that as this is a bailable offence the accused himself should pay the expenses for the witnesses under rule 366 of the Criminal Rules of Practice. That rule specifically provides for the payment of expenses of witnesses by Government in cases shown in the second schedule of the Code of Criminal Procedure as not bailable. The question therefore for consideration is whether a case in which an accused is prosecuted for an offence punishable under rule 81 (4) of the Defence of India Rules is non-bailable as per the second schedule of the Code of Criminal Procedure The Nagpur High Court has not dealt with the question whether an offence punishable under rule 81 (4) of the Defence of India Rules is bailable or not as per the provisions in the second schedule of the Code of Criminal Procedure. All that is observed by the learned Judge there is that as there is no notification that the offences are not bailable, they must be considered to be bailable and he has not considered with reference to the second schedule of the Code of Criminal Procedure whether such offences are bailable under that schedule or not The last item in schedule II deals with offences against other laws, that is to say, other than those punishable under the Indian Penal Code and it is stated with regard to such offences that if the offence is punishable with death, transportation or imprisonment for seven years or upwards it is not bailable, that if punishable with imprisonment for three years and upwards, but less than seven, it is not bailable, except in cases under the Indian Arms Act, 1878, section 19 which shall be bailable, that if punishable with imprisonment for one year and upwards, but less than three years it is bailable, and that if it is punishable with imprisonment for less than one year or with fine only, then also it is bailable It cannot be said that this is a case in which the offence is punishable with imprisonment for one year and upwards but less than three years because under rule 81 (4) the Court can award on an accused a sentence of three years' imprisonment. In considering the punishment awardable under the rule, we will have to take the maximum punishment and if there is a possibility of the accused being awarded three years' imprisonment, then the case will come under the class " if punishable with imprisonment for three years and upwards but less than seven years " and the offence is not bailable. The Magistrate therefore was not justified in treating the case as one in which the accused has been charged with an offence which is bailable The order of the lower Court refusing to pay the expenses of the defence witnesses on the ground that the offence is bailable and that the Court is therefore not bound to pay under rule 366 of the Criminal Rules of Practice is set aside

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE PATANJALI SASTRI.

The Commissioner of Income-tax, Madras *Applicant**

v.

Sri Talupuru Venkatasubbiah Chetty, Nellore . *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (xi)—Dissolution of money-lending partnership—Division of assets—Debts due to the partnership assigned to one of the partners as part of the share of that partner—Some of them turning out to be irrecoverable—Amount of such debts, if can be deducted in calculating the assessable income of that partner

On the dissolution of a money-lending partnership in 1933, one of its partners, a joint Hindu trading family received as part of its share certain promissory notes executed by the debtors of the partnership At that time they were regarded as good and were entered in the books of the family relating to its money-lending business From time to time the promissory notes were renewed and interest was paid to the family by the debtors. The interest was included in the profits of the family and assessed to income-tax accordingly In the year of account 1941-42, the assessee, the manager

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1. I L.R. (1944) Nag. 813.

* Case Referred No. 6 of 1945. 23rd November, 1945

of the joint Hindu family wrote off as being irrecoverable some of those debts and claimed to be entitled to deduct the total amount of those debts in calculating his assessable income by reason of the provisions of section 10 (2) (*xi*) of the Income-tax Act On the refusal of the Income-tax authorities to recognise the validity of this course,

Held, though the money was actually lent by the partnership, the loans were allotted to the family of the assessee on the dissolution of the partnership and became part of the assets of the family's own business Having treated them as such and taxed the family on the interest paid in respect of those debts, it cannot be contended by the Income-tax authorities that clause (*xi*) of sub-section (2) of section 10 of the Income-tax Act does not apply The sum is allowable as a deduction in the assessment for that year under section 10 (2) (*xi*) of the Act

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of the Indian Income-tax Act (XI of 1922), as amended by Income-tax Amendment Act (VII of 1939), in 66 R A. 16, Madras, 1944-45 (assessment year 1942-43).

C S. Rama Rao Sahib for Applicant.

P. R. Srinivasan for Respondent.

The Judgment of the Court was delivered by

The Chief Justice —The assessee is the manager of a joint Hindu trading family, which deals in timber, iron and hardware and runs a money-lending business. Before 1933, it carried on a separate money-lending business in partnership with one Chinni Veera Swami Chetti This business was dissolved in 1933 and its assets were divided between the partners. As part of its share the family of the assessee received certain promissory notes executed by persons to whom the partnership had lent money At the time of the dissolution these debts were regarded as being good and were entered in the books of the family relating to its money-lending business. From time to time the promissory notes were renewed and interest was paid to the family by the debtors This interest was included in the profits of the family and assessed to income-tax accordingly

In the year of account 1941-42 the assessee wrote off as being irrecoverable three debts, namely, Rs. 3,182, Rs 4,382 and Rs 1,291, making in all Rs 8,855. The assessee claimed to be entitled to deduct this amount in calculating his assessable income by reason of the provisions of section 10 (2) (*xi*) of the Indian Income-tax Act The Income-tax authorities refused to recognise the validity of this course, but it was upheld by the Income-tax Appellate Tribunal, Madras Bench, in an order dated 11th May, 1944 At the instance of the Commissioner of Income-tax the Tribunal has referred to this Court under the provisions of section 66 (1) the following question .

"Whether on the facts and in the circumstances of the case, the sum of Rs 8,855 is allowable as a deduction in the assessment for 1942-43 under section 10 (2) (*xi*) or any other provisions of the Act"

Section 10 (2) (*xi*) allows a person carrying on a money-lending business to deduct loans made in the ordinary course of that business when they are irrecoverable, provided that they do not exceed the amount actually written off as irrecoverable in the books of the assessee In this case all the three debts were written off and it is accepted by the Commissioner of Income-tax that they are in fact irrecoverable. Mr. Rama Rao Sahib, on behalf of the Commissioner, says that the Tribunal erred in allowing the assessee's appeal because these loans were not made in the ordinary course of the family's business but were made on the course of the partnership business It is true that the money was actually lent by the partnership, but the loans were allotted to the family on the dissolution of the partnership and they became part of the assets of the family's own business The promissory notes which were actually written off as irrecoverable were not the original promissory notes, but they were promissory notes which had been renewed by the borrowers in favour of the assessee. Inasmuch as the Income-tax authorities have since the dissolution regarded these loans as being part of the family's-business and taxed the family on the interest paid in respect of them, it is rather surprising that they should now contend that clause (*xi*) does not apply. Since 1933 these

loans have been regarded as having been made by the assessee in the ordinary course of its business. In fact, in the assessment for 1936-37 the assessee was allowed to deduct as irrecoverable another debt which it had received on the dissolution of the partnership

Mr. Rama Rao Sahib, in the course of his argument, referred us to the decision of the Calcutta High Court in *Chimanlal Rameswarlal v Commissioner of Income-tax, Bengal*[1], which he regarded as supporting his argument. The facts in that case do not appear to be on all fours with the facts in the present case and we do not regard it as being applicable We reserve our opinion as to whether it should be followed by this Court until the question arises on exactly similar facts We answer the question referred by stating that the sum of Rs. 8,855 is allowable as a deduction in the assessment for 1942-43 under section 10 (2) (*xi*)

The Commissioner will pay the assessee's costs, Rs 250.

V S. *Reference answered in favour of the assessee*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay)

PRESENT —LORD THANKERTON, LORD SIMONDS AND LORD GODDARD

Shankar Dattatraya Prabhavalkar and others *Appellants**

v

The Municipal Corporation of the City of Bombay and another . *Respondents.*

City of Bombay Municipal Act (III of 1888), section 297—Construction—Regular line of a public street——Building line or boundary line of the street

A consideration of the terms of section 297 of the City of Bombay Municipal Act and of its setting in the Act, shows conclusively that it is dealing with the building line of a public street, as distinguished from the boundary line or intended boundary line of a public street

Sir Thomas Strangman, K C , S P. Khambatta and *J. M R. Jayakar* for Appellants.

J Millard Tucker, K C. and *W. W. K. Page* for Respondents.

Their Lordships' Judgment was delivered by

LORD THANKERTON —This is an appeal from a judgment and decree of the High Court of Judicature at Bombay, in its civil appellate jurisdiction, dated the 1st April, 1934, which affirmed a judgment and decree of that Court in its original jurisdiction, dated the 16th October, 1942, whereby the suit of the appellants against the respondents was dismissed

In the suit the appellants challenged the actions of the second respondent, who is the Municipal Commissioner for the City of Bombay, purporting to be taken under the City of Bombay Municipal Act, 1888 (Bombay Act No III of 1888) in the course of development of the Mahim district of the City, and, in particular, of an area, which included the land now occupied by the Shivaji Park, and the surrounding land, which included the plot of land now owned by the appellants. The appellants originally challenged the *bona fides* of the second respondent, who may be referred to as the Municipal Commissioner, as well as the validity of his actions, but the former ground was no longer maintained before this Board.

In 1918 the Municipal Corporation of Bombay, who are the first respondents in this appeal, resolved to proceed with a scheme for the development of the Mahim district, which provided for an open space or park for recreational purposes to be known as Shivaji Park, abutting on the sea on its western boundary and to be otherwise surrounded by a residential area Among the lands, the acquisition of which was rendered necessary by the scheme, was a plot of land containing 4,428 square yards, owned by one Mantri, and lying to the north of the proposed park An agreement was made in 1921 between the Municipal Corporation and

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1. (1940) I.T.R. 408

* P. C. Appeal No. 60 of 1944 19th December, 1945

Mantri, under which Mantri agreed to surrender the major portion of his plot, in consideration of the retention by him of the remaining portion, and the conveyance to him by the Municipal Corporation of an adjoining plot As the result of this agreement Mantri became the owner of a rectangular plot containing 1,400 square yards, with a frontage to the north on the 60 feet road which was to be constructed as a part of the scheme, and this plot became Plot No. 141, of the Shivaji Park Scheme. In 1923 the special engineer in charge of the development works asked Mantri to agree to certain restrictions on building, including a restriction on building within 15 feet of a public street, but Mantri did not agree Mantri died in 1926, and his legal representatives sold his plot to Shamrao Raghunath Raote, the contract being completed by two deeds of conveyance, in favour of the purchaser, both dated the 9th September, 1932, the first deed being a conveyance from Mantri's representatives, and the second from the Municipal Corporation Under these conveyances the purchaser acquired a freehold estate in the plot, no restrictions being imposed by the terms of the deeds on the user of the property. In 1940 Raote sold the plot to the plaintiffs in the present suit, which raises questions as to the power of the Municipal Commissioner to impose building restrictions in respect of the plot.

In 1935, the Municipal Corporation approved of the construction of a 40 feet road, and the lay-out of plots near the Park, and the application to the plots of certain restrictions, for which purpose the plots were not to be sold outright, but were to be leased subject to restrictions which would thereby be legally enforceable The 40 feet road was to run parallel to and to the south of the 60 feet road already approved of, and would adjoin the appellants' plot on its southern boundary. The other plots in the district were leased subject to covenants restricting the height of the buildings, and requiring the lessee to leave 15 feet open space between the building and the roads

In March, 1939, Raote gave notice, as required by section 337 of the Act of his intention to build upon his plot, accompanied by a plan which showed a space of 10 feet between the proposed building and each of the 60 feet and 40 feet roads. Raote did not proceed with his application, but sold the plot to the appellants in 1940, and completed the agreement by conveying the plot to them by deed dated the 19th December, 1940

On the 12th August, 1940, the first appellant gave notice under section 337 of the Act of an intention to build on the plot, accompanied by plans, which showed four proposed buildings, two of which were to be constructed right up to the 60 feet road, and two right up to the 40 feet road At first the Municipal Commissioner and his staff seem to have proceeded on the view that, in the light of the freedom from restrictions of the appellants' plot, they were unable to insist on the proposed buildings being set back from the two roads, and, on the 3rd September, 1940, intimation of disapproval under section 346 of the Act was sent to the first appellant by the City Engineer in which, after setting out the grounds of disapproval, which related to details not concerned with the present question, the notice stated

"Subject to your so modifying your intentions as to obviate the before-mentioned objections, and meeting my requirements, and not otherwise, you will be at liberty to proceed with the said building at any time before the 3rd day of September, 1941, but not so as to contravene any of the provisions of the said Act, as amended as aforesaid, or any rule, regulation or bye-law made under that Act at the time in force"

On the 7th September, 1940, the City Engineer, to whom a method of securing that the appellants should conform to the building lines that had been imposed in the case of the neighbouring plots had now occurred, wrote to the Municipal Commissioner in reference to the appellants' building proposals a letter, in which he said:

"we can compel the owner to leave open spaces in the front and rear by prescribing lines as shewn on the plan under section 297 (1) (a) of the Act This is the first time that lines are to be prescribed on these newly constructed roads Your sanction is requested to prescribe the lines A letter will be sent to-day in continuation of the previous intimation stating that M C has been pleased to prescribe regular lines and no work can be allowed within the prescribed lines"

On consideration of this letter and the plan referred to, on which the lines proposed to be prescribed were shewn in red, the Municipal Commissioner approved of the proposal, and, in accordance with his usual procedure under section 297 (1) (*a*) endorsed his approval on the City Engineer's letter On the 9th September, 1940, the City Engineer wrote to the first appellant stating that the Municipal Commissioner had been pleased to prescribe regular lines of street on the 40 and 60 feet roads, and requesting him to ascertain from his Office Assistant Engineer Survey the new lines prescribed and to modify his work accordingly, which should be clear of these lines, as also that no work would be allowed to be constructed within the sanctioned lines of the street. It may be added that the regular lines of street thus prescribed required an open space of 15 feet to be left between the building and the roads, the construction of which was practically complete by this time After some correspondence and interviews between the parties, the present suit was filed by the appellants on the 8th March, 1941

The appellants, whose suit has been dismissed in both Courts, rested their appeal before this Board on two alternative grounds In the first place they maintained that, on a proper construction of the relevant sections of the City of Bombay Municipal Act, the regular line of a public street, which may be prescribed under section 297 (1) (*a*) of the Act, means the boundary line of a street, or the intended boundary line of a street as ultimately to be constructed and that it does not contemplate what is commonly known as a building line, which may, but more probably will not, correspond with such boundary line of the street, but will lie within the adjoining plots of land at a prescribed distance from the boundary line of the street. This contention presents a question of statutory construction. If the contention succeeds, it is clear that the regular lines prescribed by the Municipal Commissioner in September, 1940, do not conform to the boundary lines of the 60 feet and 40 feet roads In the event of their failure in their first contention, the appellants alternatively maintained, that the regular line of street for these two roads had already been prescribed at the time when the construction of the roads was approved of by the Municipal Corporation long before 1940, and that under section 297 (1) (*b*) the Municipal Commissioner was not entitled to prescribe a fresh line in 1940 without the authority of the Corporation as therein provided. This contention mainly raises a question of fact.

On the first contention of the appellants the material sections of the Act are as follows :

"3 (w) 'street' includes any highway and any causeway, bridge, viaduct, arch, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years, and, when there is a footway as well as a carriageway in any street, the said term includes both ;

3 (x) 'public street' means any street heretofore levelled, paved, metalled, channelled, sewered or repaired by the corporation and any street which becomes a public street under any of the provisions of this Act,

289 (1) All streets within the city, being or which at any time become public streets, and the pavements, stones and other materials thereof shall vest in the corporation and be under the control of the Commissioner

(2) The Commissioner shall from time to time cause all such streets to be levelled, metalled or paved, channelled, altered and repaired, as occasion shall require, he may also from time to time widen, extend or otherwise improve any such street or cause the soil thereof to be raised, lowered or altered and may place and keep in repair fences and posts for the safety of foot-passengers

Provided that no widening, extension or other improvement of a public street, the aggregate cost of which will exceed five thousand rupees, shall be undertaken by the Commissioner unless or until such undertaking has been authorised by the corporation

291 The Commissioner, when authorised by the corporation in this behalf, may at any time—

(*a*) lay out and make a new public street,

(*b*) agree with any person for the making of a street for public use through the land of such person, either entirely at the expense of such person or partly at the expense of such person and partly at the expense of the corporation, and that such street shall become on completion, a public street.

(*c*) declare any street made under an improvement scheme duly executed in pursuance of the provisions of the City of Bombay Improvement Act, 1898, or the City of Bombay Improvement Trust Transfer Act, 1925, to be a public street

296 (1) The Commissioner may, subject to the provision of sections 90, 91, and 92—

(*a*) acquire any land required for the purpose of opening, widening, extending or otherwise improving any public street or of making any new public street, and the buildings, if any, standing upon such land ,

(*b*) acquire, in addition to the said land and the buildings, if any, standing thereupon, all such land with the buildings, if any, standing thereupon, as it shall seem expedient for the corporation to acquire outside of the regular line, or of the intended regular line, of such street ;

(*c*) lease, sell or otherwise dispose of any land or building purchased under clause (*b*)

PRESERVATION OF REGULAR LINE IN PUBLIC STREETS

297 (1) The Commissioner may—

(*a*) prescribe a line on each side of any public street ,

(*b*) from time to time, but subject in each case to his receiving the authority of the corporation in that behalf, prescribe a fresh line in substitution for any line so prescribed, or for any part thereof provided that such authority shall not be accorded—

(i) unless, at least one month before the meeting of the corporation at which the matter is decided, public notice of the proposal has been given by the Commissioner by advertisement in local newspapers as as well as in the Official Gazette, and special notice thereof, signed by the Commissioner, has also been put up in the street or part of the street for which such fresh line is proposed to be prescribed, and

(ii) until the corporation have considered all objections to the said proposal made in writing and delivered at the office of the municipal secretary not less than three clear days before the day of such meeting

(2) The line for the time being prescribed shall be called 'the regular line of the street'

(3) No person shall construct any portion of any building within the regular line of the street except with the written permission of the Commissioner, who shall, in every case in which he gives such permission, at the same time report his reasons in writing to the standing Committee

298 (1) If any part of a building abutting on a public street is within the regular line of such street, the Commissioner may, whenever it is proposed—

(*a*) to rebuild such building or to take down such building to an extent exceeding one-half thereof above the ground level, such half to be measured in cubic feet , or

(*b*) to remove, re-construct or make any addition to any portion of such building which is within the regular line of the street, in any order which he issues, under section 345 or 346, concerning the rebuilding, alteration or repair of such building require such building to be set back to the regular line of the street

(2) When any building, or any part thereof within the regular line of a public street, falls down, or is burnt down, or is taken down whether under the provisions of section 351 or 354 or otherwise, the Commissioners may at once take possession on behalf of the corporation of the portion of land within the regular line of the street theretofore occupied by the said building, and, if necessary, clear the same

(3) Land acquired under this section shall thenceforward be deemed a part of the public street and shall vest, as such, in the corporation

299 (1) If any land not vesting in the corporation, whether open or enclosed, lies within the regular line of a public street, and is not occupied by a building, or if a platform, verandah, step or some other structure external to a building abutting on a public street, or a portion of a platform, verandah, step or other such structure, is within the regular line of such street,

the Commissioner may, after giving to the owner of the land or building not less than seven clear days' written notice of his intention so to do, take possession on behalf of the corporation of the said land with its enclosing wall, hedge or fence, if any, or of the said platform, verandah, step or other such structure as aforesaid, or of the portion of the said platform, verandah, step or other such structure aforesaid which is within the regular line of the street, and, if necessary, clear the same and the land so acquired shall thenceforward be deemed a part of the public street "

Their Lordships agree with the opinion of all the learned Judges of the High Court that a consideration of the terms of section 297, and of its setting in the Act, shews conclusively that section 297 is dealing with the building line of a public street, as distinguished from the boundary line or intended boundary line of a public street In the first place the definition of " public street " in section 3 (*x*) relates to a street that is already in existence, and this definition applies in section 297 , this may be contrasted with section 296 (1) (*b*), which shews that the expression " intended " is used when appropriate In short, the boundary line of a street is fixed prior to actual construction, and the regular line of the street is prescribed after it has come into existence. In the second place, all public streets are vested

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by section 289 (1) in the corporation, and no-one is entitled to build upon them; therefore section 297 (3) would be mere surplusage, unless it relates to building on land outwith the boundary line of the street, but within the regular line of the street, and the same comment applies to section 298 (1), and sub-section (3) of that section must apply to the vesting of land acquired outside the boundary line of the street, as otherwise, it must have been acquired under section 296 (1), subject to compensation Section 299 (1) must also apply to land outside the boundary line of a public street. These reasons appear to be sufficient for the rejection of the appellants' contention, but their Lordships may add that they are in agreement with the reasons stated by the learned Judges of the High Court.

As regards the alternative contention of the appellants, the proposed 60 feet road was shewn on the plans submitted and its construction was sanctioned by the Municipal Corporation by its resolution of the 25th November, 1918, and the proposed 40 feet road was similarly sanctioned by the resolution of the Municipal Corporation dated the 19th September, 1935. A perusal of these resolutions and the reports upon which they proceeded makes clear that, while the boundary line of the proposed roads is approved of as shewn on the plans, there is no reference at all to the "regular line of the street" in relation to these roads, either in the reports or on the plans Indeed, the only reference to this matter is to be found in a sentence in the report of the Roads Committee dated the 10th August, 1918, which states, "In the case of existing public roads, which are proposed to be widened or altered under the scheme, the lines will be prescribed as the revised regular lines." These cases would clearly fall under section 297 (1) (*b*) and would not include the proposed 60 feet road. Accordingly, it is clear that regular lines of the street had not been already prescribed for the 60 feet and 40 feet roads prior to the action of the Municipal Commissioner in September, 1940, which is challenged by the appellants, and the alternative contention of the appellants also fails.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed and that the Judgments appealed against should be affirmed The appellants will pay the respondents' costs of the appeal.

Solicitors for Appellants: *T L Wilson & Co*

Solicitors for Respondents *Sanderson Lee & Co.*

H J U /V.S *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Someshwar H. Shelat .. *Accused**

Hoarding and Pofiteering Prevention Ordinance (XXXV of 1943, as amended by Ordinance LIII of 1944), section 12 (3)—Special officer of Commercial Tax Department empowered to investigate into offences under the Ordinance by the Provincial Government in exercise of powers conferred by the section—If a "police officer" within the meaning and for purposes of section 162, Criminal Procedure Code and section 25 of the Evidence Act—Ordinance I of 1946—Repeal of Amending Ordinance LIII of 1944—Effect

The special officer of the Commercial Tax Department empowered to investigate into offences under the Hoarding and Profiteering Prevention Ordinance by the Provincial Government in exercise of the powers conferred by section 12 (3) (introduced by the Amending Ordinance LIII of 1944) of that Ordinance is a "police officer" within the meaning of the Criminal Procedure Code and the Criminal Procedure Code applies to statements recorded by him In view of the powers conferred on him by section 12 (3) of the Ordinance he has the full status of a police officer and his powers and duties must be limited to those of a police officer under the Criminal Procedure Code which means that he has no right in an investigation under the Ordinance to require a person to sign a statement and where such a statement is reduced to writing it can only be used in accordance with the provisions of section 162 of the Code of Criminal Procedure or section 27 of the Evidence Act

The effect of the repeal of Amending Ordinance (LIII of 1944) (which introduced section 12 (3) of the Hoarding and Profiteering Prevention Ordinance) by Ordinance (I of 1946) would be that such officers would no longer after the date of that Ordinance be police officers within the meaning of the Criminal Procedure Code, but the view that they are police officers would apply to all cases which were pending before the repeal of sub-section (3) of section 12 of the Hoarding and Profiteering Prevention Ordinance

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* Cr R. C No 124 of 1946 7th March, 1946.

Case referred for the orders of the High Court under section 432 of the Criminal Procedure Code by the Chief Presidency Magistrate, Egmore, Madras, in his letter, R. O. C. 253 of 1946-D dated 22nd January, 1946.

K. S Rajagopala Aiyangar on behalf of the Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

The Order of the Court was delivered by

The Chief Justice —Under the provisions of section 432 of the Code of Criminal Procedure, the Chief Presidency Magistrate, has referred for the opinion of this Court the following question of law

"Whether a Special Officer of the Commercial Tax Department who has been empowered in this behalf by the Provincial Government of Madras in exercise of the powers conferred on them by section 12 (3) of the Hoarding and Profiteering Prevention Ordinance introduced by the amending Ordinance No LIII of 1944, is a police officer within the meaning and for the purposes of section 162 of Criminal Procedure Code and section 25 of the Indian Evidence Act"

Sub-section (3) of section 12 of the Hoarding and Profiteering Prevention Ordinance was inserted therein on the 13th December, 1944, by the amending Ordinance LIII of that year. The sub-section reads as follows

"The Controller-General and such Inspectors or other officers as may be empowered by the Central or Provincial Government in this behalf shall, within the respective areas for which they are appointed, have power to investigate all offences punishable under this Ordinance, and in conducting any such investigation shall, within the said areas, have all the powers, duties, privileges and liabilities of an officer in charge of a police station under the Code of Criminal Procedure, 1898, when investigating a cognizable offence within the limits of his station"

Section 162 of the Code of Criminal Procedure states that no statement made by a person to a police-officer in the course of an investigation under Chapter XIV, shall, if reduced into writing, be signed by the person making it The section provides the circumstances in which such a statement can be used When a witness whose statement has been reduced into writing is called for the prosecution, the Court shall at the request of the accused refer to the writing and the accused shall be furnished with a copy of it in order that any part of the statement, if duly proved, may be used to contradict the witness in the manner provided by section 145 of the Indian Evidence Act When a part of the statement is so used, any other part may be used in the re-examination of the witness, but for the purpose only of explaining any matter referred to in his cross-examination. Sub-section (2) of section 162 excludes from its operation a statement falling within the provisions of section 32 (1) of the Indian Evidence Act and does not affect the provisions of section 27 of that Act.

Section 32 (1) of the Evidence Act relates to a statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question Section 27 contains a proviso to section 25 and section 26. Section 25 states that no confession made to a police officer shall be proved as against a person accused of an offence. Section 26 says that no confession made by a person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved against him. Section 27 says that when a fact is deposed to as discovered in consequence of information received from a person accused of the offence in the custody of a police officer so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Therefore the law places very limited uses on a statement made to a police officer

Under sub-section (3) of section 12 of the Hoarding and Profiteering Prevention Ordinance, the Provincial Government have given certain officers of the Commercial Tax Department power to investigate offences under the Ordinance within their respective jurisdictions. In making the reference the learned Chief Presidency Magistrate has pointed out that ever since the ordinance has been in force it has been the practice for these officers to begin an investigation after a complaint has been made to them by raiding the place of business of the dealer who is accused of having committed an offence, or any place where goods believed to belong to

him are suspected of having been hoarded and seizing such goods and account books. The investigating officer then draws the attention of the dealer to all the circumstances which point towards his guilt and calls upon him to give an explanation. The dealer's explanation is reduced to writing and is signed by him and attested by witnesses. Sometimes the explanation is incorporated in the search list itself In such a case the dealer may sign a statement prepared by the investigating officer in which he not only acknowledges the seizure of certain articles from his shop or godown, but also confesses that he has given a statement in respect of them For example, the statement may say that he first told the investigating officer that he had no stock of certain goods, but that on a search being made such goods were found on his premises. It has apparently also been the practice to take similar statements from persons acquainted with the facts of the case and get them to sign their statements. If a witness turns hostile he is confronted by the prosecution with the statement given to the investigating officer.

If an investigating officer is a police officer within and for the purpose of section 162 of the Code of Criminal Procedure this practice is obviously illegal That he is a police officer within the meaning of the section we have no doubt whatever. Section 12 (3) of the Hoarding and Profiteering Prevention Ordinance expressly gives him all the powers, duties, and privileges of an officer in charge of a police station under the Code of Criminal Procedure, 1898, when investigating a cognizable offence within the limits of his station Therefore he has the full status of a police officer and his powers and duties must be limited to those of a police officer under the Code of Criminal Procedure, which means that he has no right in an investigation under the Ordinance to require a person to sign a statement and where such a statement is reduced to writing it can only be used in accordance with the provisions of section 162 of the Code of Criminal Procedure or section 27 of the Evidence Act.

In his statement of the case the Chief Presidency Magistrate has expressed the opinion that if the question is to be answered in the way in which we answer it, it will create insuperable difficulties in making investigations under the Hoarding and Profiteering Prevention Ordinance The Court is not concerned with such difficulties. It can only state the law at the time when this reference was made and the answer to the question referred is that the officers appointed to investigate these offiences are police officers within the meaning of the Code of Criminal Procedure and the Code of Criminal Procedure applies to statements recorded by them

The learned Crown Prosecutor has drawn our attention to the fact that the Government of India by Ordinance I of 1946 has repealed Ordinance No LIII of 1944 which means the deletion of sub-section (3) to section 12 of the Hoarding and Profiteering Prevention Ordinance The repealing ordinance was published in the *Fort St George Gazette* on the 22nd January, 1946, the date on which this reference was made The position is now that investigating officers under the Hoarding and Profiteering Prevention Ordinance are no longer police officers within the meaning of the Code of Criminal Procedure; but the answer to the reference given applies to all cases which were pending before the repeal of sub-section (3) of section 12 of the main Ordinance

V S. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE LAKSHMANA RAO.

Kolappurath Achuthan Nair . *Appellant**

v

Pachakkil Thayyil Choyikutty's children Devaki (Minor) and others. *Respondents.*

Malabar Tenancy Act (XIV of 1930), *sections* 20 (6), 21 (1) *and* (2) *and* 43 (1) (a) *and* (b)—*Eviction of tenant under section* 20 (6) *on the ground that holding was required by the landlord* bona fide *for building purposes—Landlord subsequently transferring holding to stranger—Suit by evicted tenant for restoration of possession within one year of transfer—If premature—Limitation—Governed by sub-section* (1) (a) *and not by sub-section* (1) (b) *of section* 43

After a tenant was evicted from his holding by the landlord under section 20 (6) of the Malabar Tenancy Act on the ground that the holding was required *bona fide* for building purposes for the tarwad

* S. A. No. 150 of 1945. 22nd February, 1946.

the lands were transferred by the landlord to a stranger on the 8th June, 1942 A suit was filed on 22nd December, 1942, by the evicted tenant for the restoration of the lands On a contention that the suit was premature,

Held, negativing such a contention that the suit was founded on the transfer of the lands after eviction obtained under clause (6) of section 20 and sub-section (2) of section 21 expressly provides that under such circumstances the tenant shall be entitled to the right of suit conferred by sub-section (1) of the section The suit was therefore governed by section 43 (1) (*a*) of the Act, which requires it to be instituted within one year from the date of the transfer by the landlord and section 43 (1) (*b*) has no application. There is no conceivable reason for postponing the right of a tenant evicted under clause (6) of section 20 to sue for restoration of the lands on the ground of transfer by the landlord until the expiry of six years after eviction It is obvious that section 43 (1) (*b*) relates to the right of suit conferred by sub-section (2) of section 21 of the Act

Appeal against the decree of the Court of the Subordinate Judge, Calicut, dated 18th August, 1944, in A. S. No 102 of 1944, preferred against the decree of the Court of the District Munsiff, Calicut, in O S No 1510 of 1942, dated 30th December, 1943

D A. Krishna Variar for Appellant.

S. R Subramania Aiyar for Respondents.

The Court delivered the following

JUDGMENT —The appellant was a tenant of the suit lands within the meaning of the Malabar Tenancy Act and his eviction was obtained under Clause (6) of section 20 of the Act on the ground that the holding was required by the landlord *bona fide* for building purposes for his tarwad The lands were transferred to the seventh defendant, a stranger, on 8th June, 1942, and the suit for the restoration of the lands was filed by the appellant on 22nd December, 1942 It has been dismissed as being premature and the question is whether the decision is correct.

Section 21 of the Act confers on the tenant a right to sue for restoration of the lands in certain cases and section 43 prescribes the period of limitation for such suits Sub-section (1) of section 21 provides that in any case in which eviction is obtained on the ground specified in clause (5) of section 20, subject to the provisions of section 43, if the landlord who obtains such eviction transfers any of the lands to any person on any kind of lease or mortgage with possession or on kanom, kuzhikanom or verumpattam within six years of such eviction, the tenant shall be entitled to sue for the restoration to him of the possession of all the lands from which he was evicted and to hold them with all the rights and subject to all the liabilities of a tenant, and sub-section (2) provides that in any case in which eviction has been obtained on the ground specified in clause (6) of section 20, the tenant shall be entitled to the right of suit conferred by sub-section (1) not only under the circumstances mentioned therein, but also if the building for constructing which the eviction was obtained is not erected on the lands within six years of such eviction. Section 43 (1) (*a*) requires a suit for restoration under sub-section (1) of section 21 to be instituted within one year from the date of the transfer by the landlord; while section 43 (1) (*b*) provides that a suit for restoration under sub-section (2) of section 21 shall be instituted within one year from the expiry of the six years after the eviction.

In this case the suit for restoration was founded on the transfer of the lands after eviction was obtained under clause (6) of section 20 and sub-section (2) of section 21 expressly provides that under these circumstances the tenant shall be entitled to the right of suit conferred by sub-section (1) of the section. The suit is, therefore, governed by section 43 (1) (*a*) which requires it to be instituted within one year from the date of the transfer by the landlord and the view of the Courts below that section 43 (1) (*b*) is applicable is untenable There is no conceivable reason for postponing the right of a tenant evicted under clause (6) of section 20 to sue for restoration of the lands on the ground of transfer by the landlord until the expiry of six years after eviction and it is obvious that section 43 (1) (*b*) relates to the right of suit conferred by sub-section (2) of section 21, *i e*, the right to sue for restoration of the lands if the building for constructing which the eviction was

obtained is not erected on the lands within six years of such eviction. The dismissal of the suit on the ground that it cannot be instituted before the expiry of six years after the eviction is therefore unsustainable and the appellant is entitled to restoration of the lands.

The second appeal is accordingly allowed and the suit is remanded to the trial Court for passing the appropriate decree for restoration of the lands having regard to the proviso to sub-section (2) of section 43 of the Act. The respondents will pay the costs of the appellant here and before the Subordinate Judge and the costs in the trial Court will be provided for in the decree to be passed.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AIYAR

Kunju Iyer *Petitioner**

Criminal Procedure Code (V of 1898), section 403—Conviction by trial Court for offence under section 409, Indian Penal Code—Acquittal by appellate Court for charge framed with directions to trial Court to frame charge under section 420, Indian Penal Code and for a fresh trial—Not illegal

The petitioner was found guilty by the trial Court of an offence punishable under section 409 of Indian Penal Code and on appeal the appellate Court acquitted him on that charge but directed the papers to be sent to the lower Court for a charge being framed under section 420, Indian Penal Code and evidence being let in On a contention that the proceedings should be quashed in view of section 403, Criminal Procedure Code,

Held, that the provisions of section 403 of the Criminal Procedure Code do not apply as the appellate Court instead of itself finding the accused guilty under section 237, Criminal Procedure Code, as it could, merely wanted to give the petitioner an opportunity to have a fresh trial after framing a fresh charge It is not a case of a fresh prosecution or fresh trial.

Rex v *McIver*, (1936) 70 M L J 635 (F B), distinguished.

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the proceedings in C C No. 533 of 1944 on the file of the Court of the Additional First Class Magistrate, Coimbatore.

T M Kasturi for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner was convicted by the joint Magistrate of Pollachi for an offence punishable under section 409 of the Indian Penal Code On appeal the learned Sessions Judge was of opinion that the facts alleged did not constitute an offence punishable under section 409 and accordingly acquitted the petitioner, but directed that the papers be sent to the lower Court for a charge being framed under section 420 and evidence being let in. It is urged before me that the proceedings should be quashed in view of the provisions of section 403 of the Code of Criminal Procedure. Sub-section (1) of that section runs thus :

"A person who has been once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237 "

In this case it is not disputed that the first Court itself could have convicted the petitioner for an offence punishable under section 420 even though no charge under that section had been framed. It is hence stated that this is a case in which he should have been convicted by reason of the provisions of section 237 of the Criminal Procedure Code and therefore the acquittal in this case would be a bar to a further trial in respect of an offence under section 420 of the Indian Penal Code. What was done in this case was that instead of the appellate Court itself finding thim guilty under section 237, it wanted to give an opportunity to the petitioner to have a fresh trial after framing a fresh charge and let in evidence and that was within the powers of the Court. What has been done was the exercise of the powers under section 237 with this addition, namely, that certain privileges were sought to be given to the

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* Cr. M. P. No. 1211 of 1945. 16th January, 1946.

accused by ordering a fresh charge to be framed and a fresh trial. The appellate Court as a Court of error found that the first Court had committed a mistake in convicting the petitioner of an offence punishable under section 409 and at the same time exercised the powers which the first Court could have exercised if it had itself noticed the error and acted I hence do not think that this is a case of a fresh prosecution or a fresh trial When the error was noticed by the Court, it corrected the error and exercised the same powers as the first Court could have exercised if it had noticed the error

My attention is drawn to the decision in *Rex* v *John McIver*[1]. But that case has no application to the facts of this case, at any rate, that case can be distinguished from the present case In that case there was an acquittal by reason of compounding and the matter rested there It was taken in appeal and the appellate Court confirmed the order and it did not interfere But after having accepted the acquittal, the Court directed on the same facts a prosecution for a different offence because that was prayed for in the original complaint. That was sought to be prohibited by section 403 of the Code of Criminal Procedure, whereas in this case the case had not come to an end The case ended in a conviction which was upset by the appellate Court While acquitting the petitioner, the appellate Court acting under section 237 observed that the alternative charge should be inquired into. I therefore do not think the decision in *Rex* v. *John McIver*[1] applies to the facts of this case In these circumstances I do not think I will be justified in interfering with the order of the appellate Court, and quashing the further proceedings. The petition is dismissed.

V.P S *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

Y A A V R Sethuraman Chettiar .. *Appellant**

v.

K K R. M R M Ramanathan Chettiar (died) represented by his Legal Representatives Muthiah Achi and others .. *Respondents.*

Stamp Act (I of 1899 as amended in Madras), sections 26, 31, 32, 33, and 42—Mortgage deed—Present and future advances—Application to Collector beyond one month—Additional stamp duty paid—Claim to enforce mortgage—Decree for entire amount inclusive of future advances—Power of Court to pass—Madras Agriculturists' Relief Act (IV of 1938), section 3 (ii)—Burden of proof

The present plaintiff who financed one of the parties to a litigation obtained a mortgage in respect of monies advanced by him for the conduct of the suit Under the deed plaintiff agreed to advance Rs 10,000 in the first instance and further sums later on if required The mortgage was for a stated sum of Rs 10,000 but it also provided that that the mortgaged properties should be security for the amounts to be advanced additionally and interest thereon After the termination of the previous suit the present plaintiff applied to the Collector for adjudication of the proper stamp duty payable on the deed after taking into account the subsequent advances The Collector adjudged that the document was chargeable with duty under Articles 33 and 4 (*c*) of Schedule I-A of the Stamp Act as amended in Madras, and the penalty on the excess stamp payable was collected. Objections having been raised to the validity of the procedure adopted,

Held, that the Collector had jurisdiction to adjudicate as to the proper stamp duty payable in respect of the deed although it was not presented within one month of its execution and that as a result of the certificate endorsed by him on the bond it could be acted upon as if it had been duly stamped.

Held also, that the instrument, when certified became effective and enforceable in respect of the entire amount due thereunder, and not merely for the amount originally advanced.

Although the initial burden to prove that he is an agriculturist as defined in Madras Act (IV of 1938) lies on the debtor when he proves that he owns a saleable interest in any agricultural land of the kind mentioned in section 3 (ii), the burden shifts to the creditor to prove that the debtor is disqualified under one or other of the provisos from claiming the status of an agriculturist.

Periasami Pillai v *Swathia Pillai*, (1940) 2 M L J 498, referred to

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* Appeal No 25 of 1945 16th January, 1946.

1. (1936) 70 M L J. 635 (F B).

Appeal against the decree of the Court of the Subordinate Judge of Devakottai in O. S. No. 97 of 1943, dated 21st August, 1944

A. C Sampath Aiyangar for Appellant.

R · Gopalaswami Aiyangar and *K C Srinivasan* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J—This appeal arises out of a suit to enforce a mortgage bond executed on 30th March, 1937, by one Y A RM Veerappa Chetti in favour of the plaintiff-respondent.

One Y A. A. R. Veerappa Chetti (who will be referred to as the deceased Veerappa Chetti) died without issue on the 12th March, 1937. Y. A. RM Veerappa Chetti who was a near *pangali* of the deceased Veerappa Chetti instituted a suit for recovery of the properties pertaining to the estate of the deceased Veerappa from the defendant, appellant herein, who claimed to be the adopted son of the deceased Veerappa. The suit was filed soon after the death of the deceased Veerappa, but as the claimant Veerappa did not have sufficient funds for the conduct of the litigation he sought to assistance of the respondent who agreed to advance Rs 10,000 in the first instance and further sums later on if required, and in pursuance of that agreement the claimant Veerappa executed the suit mortgage Ex P-1 in favour of the respondent for Rs 10,000 mortgaging all the properties pertaining to the estate of the deceased Veerappa, though the title thereto was then under dispute Ex P-1 provided that if any amount over and above the sum of Rs 10,000 for which it was executed was required for the litigation and if Veerappa made a request for such further advance, the properties mortgaged shall be a security for the amounts thus additionally advanced and the interest thereon. The suit (O S No 67 of 1937 on the file of the Subordinate Judge of Devakottai) in which the respondent also joined as a co-plaintiff was dismissed by the trial Court which found the adoption to be true The plaintiff thereupon preferred an appeal to this Court (A S No. 83 of 1940) The claimant Veerappa, however, died before the appeal was heard leaving the respondent on record as the sole appellant. When that appeal was part heard, the parties, that is, the present respondent and the appellant, compromised the matter, the appellant admitting the liability of the estate of the deceased Veerappa Chetti under the mortgage of 30th March, 1937, and the respondent for his part admitting the appellant's title to that estate on the footing of a valid adoption. There was a stipulation that in any suit that might be instituted "the only plea open to the respondent (that is present appellant) is to be about the amount due under the mortgage, no other plea being open to him" (Ex P-20). A decree was passed in terms of the compromise on the 15th December, 1942, (Ex. P-23). As the amount was not paid in accordance with the terms decreed, the respondent brought the present suit on 21st October, 1943, to enforce the mortgage Ex P-1, claiming that in addition to the Rs 10,000 specified in the deed, he had advanced from time to time Rs 7,107-13-3 and that both these sums with interest amounted to Rs 29,541-7-3 as on the date of the plaint The sum of Rs. 7,107-13-3 though alleged to have been advanced before the compromise Ex. P-20 was not then agreed upon as payable to the respondent under the mortgage, and the appellant, acting on the reservation, in the compromise, of disputes regarding the amount due under the bond, denied his liability to pay the amount and the interest thereon.

As the stipulation in the mortgage deed regarding further advances did not specify any amount, the respondent, before instituting the suit, applied to the Revenue Divisional Officer, Devakottai, empowered to act as 'Collector,' on 31st July, 1943, for adjudication as to the proper stamp duty payable on the instrument as a whole. The application has not been exhibited in the case, but there is no serious dispute that the additional amount for which the mortgage was sought to be enforced was mentioned before the Collector. On 13th August, 1943, the Collector adjudged that the document was chargeable with a duty of Rs. 75-12-0 under articles 33 and 4 (*c*) of Schedule 1-A of the Stamp Act as amended in Madras. The document having already borne stamps of the value of Rs. 75 which is the

proper duty chargeable on Rs. 10,000, the Collector levied the deficit duty of As 12 with a penalty of Rs. 7-8-0 from the respondent, and a certificate to that effect was endorsed on the bond Ex. P-1 It was on the bond thus certified that the suit has been brought.

Various pleas were raised in defence but it is not necessary for the purpose of this appeal to refer to all of them as only three points have been argued by the appellant's learned counsel, Mr. Sampath Aiyangar He contended firstly, that under section 26 of the Indian Stamp Act, 1899, the respondent is precluded from claiming under Ex. P-1 any sum beyond the amount for which the stamp duty paid on the bond would, at the date of the execution, have been sufficient, that is, beyond Rs 10,000, as Rs. 75-12-0 would be sufficient to cover a mortgage for that amount only ; secondly, that the Court below was wrong in holding that the appellant was not an agriculturist entitled to the benefits of the Madras Agriculturists' Relief Act, 1938 , and lastly that the appellant was entitled to relief under the Usurious Loans Act as amended in Madras. We will deal with these points in the same order.

Before dealing with the first contention it will be convenient to call attention to the relevant provisions of the Indian Stamp Act so far as they are material here.

Section 26 ·

"Where the amount or value of the subject-matter of any instrument chargeable with *ad valorem* duty, cannot be, or (in the case of an instrument executed before the commencement of this Act) could not have been ascertained at the date of its execution or first execution, nothing shall be claimable under such instrument more than the highest amount or value for which, if stated in an instrument of the same description, the stamp actually used, would, at the date of such execution have been sufficient

* * * * * *

Provided also that, where proceedings have been taken in respect of an instrument under section 31 or 41, the amount certified by the Collector shall be deemed to be the stamp actually used at the date of execution "

Section 31 (1)

"When any instrument, whether executed or not and whether previously stamped or not, is brought to the Collector, and the person bringing it applies to have the opinion of that officer as to the duty (if any) with which it is chargeable and pays a fee of such amount (not exceeding five rupees and not less than eight annas) as the Collector may in each case direct, the Collector shall determine the duty (if any) with which, in his judgment, the instrument is chargeable "

Section 32 (1) .

"When an instrument brought to the Collector under section 31, is, in his opinion, one of a description chargeable with duty, and

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Section 32 (3) :

"Any instrument upon which an endorsement has been made under this section shall be deemed to be duly stamped and if chargeable with duty, shall be receivable in evidence or otherwise and may be acted upon and registered as if it had been originally duly stamped

Provided that nothing in this section shall authorise the Collector to endorse—

(*a*) any instrument executed or first executed in British India and brought to him after the expiration of one month from the date of its execution or first execution, as the case may be ,

* * * * * *

Section 33 (1) :

"Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeabl in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same "

Section 40 (1) ·

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"When the Collector impounds any instrument under section 33 . . . . . he shall adopt the following procedure "

* * * * * *

(*b*) if he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same together

with a penalty of five rupees or, if he thinks fit, an amount not exceeding ten times the "amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees."

* * * * * *

Section 42 (1)

"When the duty and penalty (if any) leviable in respect of any instrument have been paid under section 35, section 40 or section 41, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof and the name and residence of the person paying them

(2) Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped "

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The expression 'duly stamped' is defined in section 2 (11) as meaning that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in British India

Mr Sampath Aiyangar has raised a number of questions as to the interpretation of these provisions with a view to show that section 26 applies to the case notwithstanding the Collector's certificate endorsed on Ex P-1 and precludes the Court from passing a decree for any sum in excess of Rs 10,000 He argues that the Collector had no jurisdiction to entertain the respondent's application for adjudication of the proper stamp duty for Ex P-1 under section 31, as the document was brought to him more than six years after its execution and that the certificate endorsed by him on the bond was void and inoperative He relies upon the proviso to section 32 which requires that the instrument on which an endorsement of the Collector's adjudication is sought should be brought within one month after its execution It is said that sections 31 and 32 contained in Chapter III form one integrated procedure for adjudication as to stamps and that the time-limit referred to in proviso (*a*) to section 32 governs applications made under section 31 We are unable to agree with this view. Section 31 provides no time-limit for an application to the Collector for adjudication as to the proper stamp duty payable in respect of an instrument. There is nothing in the section to prevent a person from resorting to the Collector for an adjudication as to the proper stamp even after the expiry of one month from the date of its execution If the instrument is brought to the Collector within one month of its execution, the applicant would be entitled to have the Collector's certificate endorsed on the instrument on payment of the deficit duty, if any, but without having to pay any penalty But if he seeks the Collector's adjudication beyond the time-limit specified in section 32, the Collector has, under section 33, to impound the instrument and proceed under section 40 to decide whether the instrument is duly stamped and to require the payment of the additional duty chargeable in respect of the instrument together with the prescribed penalty in case he is of opinion that it is not duly stamped. On payment of such duty and penalty a certificate that the proper duty and penalty have been paid has to be endorsed under section 42 of the instrument which becomes thereupon admissible in evidence and may be acted upon as if it had been duly stamped It is under this procedure that the Collector must be taken to have dealt with Ex P-1, for it is significant that he levied a penalty which he had no power to do under section 32. We are accordingly of opinion that the Collector had jurisdiction to adjudicate as to the proper stamp duty payable in respect of Ex. P-1 although it was not presented within one month of its execution and that, as a result of the certificate endorsed by him on the bond, it can be acted upon as if it had been duly stamped.

Even so, argues Mr. Sampath Aiyangar, section 26 applies in full force and precludes the Court from passing decree for more than Rs 10,000, as the only effect of the Collector's certificate is, according to the second proviso to that section, that the amount certified by him shall be deemed to be the stamp actually used at the date of the execution. But even assuming that Ex. P-1 had been originally stamped with a stamp of the value of Rs. 75-12-0, no more than Rs. 10,000 could,

it is said, be claimed on the bond as that would be " the highest amount or value for which, if stated in an instrument of the same description, the stamp actually used would, at the date of such execution, have been sufficient " Learned counsel contends that the view taken by the Collector who treated Ex. P-1 as a mortgage for Rs. 10,000 and an agreement as to the sums to be advanced later, chargeable with a duty of Rs 75 in respect of the mortgage and As 12 in respect of an agreement is erroneous, as the definition of a " mortgage deed " in section 2 (17) includes an instrument whereby properties are mortgaged for money to be advanced by way of loan. Ex. P-1 should accordingly have been treated as a mortgage for Rs 17,107-13-3 and the stamp duty payable should have been fixed on that basis, as the whole sum had been advanced before the respondent applied for adjudication as to the proper stamp, but the Collector not having done so and a stamp duty of only Rs. 75-12-0 having been paid as certified by the Collector, the instrument cannot, it is claimed, operate as a mortgage for more than Rs. 10,000 having regard to the provisions of section 26 This contention cannot be accepted, as it overlooks the provisions of section 42 (2) that, when an instrument originally not sufficiently stamped is certified as duly stamped by a person duly authorised in that behalf on payment of the deficit duty as determined by him with or without a penalty as the case may be, it may be acted upon " as if it had been duly stamped," which means that the instrument bears a stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with law for the time being in force In other words, the instrument, when certified as aforesaid, becomes effective and enforceable. In an analogous case where royalties payable in a mining lease were estimated for the purpose of stamp duty at an average annual value of Rs. 2,000 instead of at Rs. 20,000 so as to entitle the lessor under the first proviso to section 26 to claim the whole amount of the royalty whatever it may be, but a suit was brought to recover a sum in excess of the estimated annual value, the Patna High Court decided that under section 35 the plaintiff was entitled, on payment of the deficit duty payable on the amount claimed and the penalty prescribed, to enforce his contract to the full amount of royalty payable under the lease (*Kumar Braj Mohan Singh* v *Lachmi Narain Agarwala*[1], and the decision was approved by their Lordships of the Privy Council in *Lachmi Narayan Agarwala* v *Braja Mohan Sing*[2]. In the same reasoning, the adoption of a similar procedure by the Collector under section 31 read with section 33, section 40 and section 42 resulting in a certificate that the instrument is duly stamped must have the effect of excluding the operation of section 26 As pointed out by the Patna High Court, the object of the Stamp Act is not to alter the terms of the bargain between the parties but to protect the revenue by excluding proof of the bargain by an instrument not duly stamped It would be a strange result if, after securing from the officer duly empowered in that behalf an adjudication as to the proper stamp duty payable on an instrument and getting it certified as duly stamped on payment of the deficit duty and penalty as determined by that officer, a person were to find himself barred, for no fault of his, from enforcing his full claim according to the terms of the instrument We are therefore of opinion that the respondent is entitled to a decree for the full amount of Rs. 17,107-13-3, provided of course, the claim is otherwise sustainable

Turning next to the appellant's contention under the Madras Agriculturists' Relief Act, 1938, the Court below has refused relief to the appellant on the ground that he is disqualified from claiming the benefits of the Act by reason of proviso (C) to section 3 (ii) of that Act. This disqualification turns on the appellant having been assessed under the Madras Local Boards Act within two years immediately preceding the 1st October, 1937, to property or house-tax in respect of buildings or lands of the aggregate annual rental value of Rs 600 or more The appellant complains that the Court below allowed this point to be raised at a very late stage after the trial and arguments were concluded and judgment was reserved It appears from the *B* diary that after the case was closed on 1st August, 1944, the learned

1. (1920) 5 Pat. L J 660.

2. (1924) 47 M L J 300 I L R. 51 I A. 332, I.L.R. 4 Pat. 34 (P.C.).

Judge allowed the respondent on 7th August, 1944, to file an affidavit along with Exs. P-27 and P-27 (*a*) which are extracts from the house-tax Demand Register of the Puduval Panchayat Board and a certificate granted by the executive officer of the Board respectively, purporting to show that the properties included in the mortgage Ex P-1 were assessed to house-tax on the basis of a rental value exceeding Rs. 600. It would appear that the learned Judge after allowing the respondent to file these documents gave an opportunity to the appellant to rebut these documents and also called for a report on the point from the Receiver who had been appointed in O. S No. 67 of 1937 and was in management of the properties involved in that suit. The appellant adduced no rebutting evidence but filed a "memorandum of objections" stating *inter alia* that he did not admit that the properties referred to in Exs P-27 and P-27 (*a*) belonged to the estate of deceased Veerappa In these circumstances it is contended by Mr Sampath Aiyangar that the appellant was not afforded by the learned Subordinate Judge sufficient opportunity to rebut the documents newly filed and that the learned Judge further erred in throwing upon the appellant the burden of establishing that he was an agriculturist, although the appellant was admittedly the owner of the mortgaged properties which included agricultural lands As regards the question of onus, it does appear that the learned Judge has overlooked the decision of this Court in *Periasami Pillai* v *Sivathia Pillai* [1], where it has been held that although the initial burden to prove that he is an agriculturist as defined in the Act lies on the debtor, when he proves that he owns a saleable interest in any agricultural land of the kind mentioned in section 3 (*ii*) the burden shifts on to the creditor to prove that the debtor is disqualified, under one or the other of the provisos to section 3 (*ii*), from claiming the status of an agriculturist It is suggested for the appellant that two of the items comprised in the mortgage which are shown to have been assessed under Exs. P-27 and P-27 (*a*) did not really belong to the estate of the deceased Veerappa, but were wrongly included in the suit mortgage which was executed by the claimant Veerappa, and that was why they were not included in the schedule to the plaint in O. S. No. 67 of 1937 The respondents' learned counsel, however, submits that the schedule was not exhaustive as shown by the allegations made in that plaint and that, in any case, being a near pangali of the deceased Veerappa, the appellant owns a share in his own right as a member of his natural family in the properties described in the schedule in which the deceased Veerappa was entitled to a joint interest with others It is pointed out that, so far as item 1 of that schedule was concerned the appellant clearly admitted that he was entitled to a share in his own right. The respondents' learned counsel has also urged that although the burden of showing that the appellant came within proviso (*c*) may rest upon the respondent, still, inasmuch as the appellant made no attempt to show that the deceased Veerappa was not the owner of the two items which he now says do not form part of his estate, the finding of the lower Court should not be disturbed After giving due weight to all these considerations, we consider that the disposal of this question by the Court below is not satisfactory The appellant's liability for a large amount turns on that question and it should have been properly raised by the respondent during the trial so as to give the appellant an adequate opportunity to repel his alleged disqualification under proviso (*c*) to section 3 (*ii*) the burden of proving which clearly lay on the respondent in the circumstances of the case We are of opinion that the Court below should be called upon to submit a clear finding on the question (*i*) whether items 8 and 9 in the schedule to the mortgage deed, Ex P-1 form part of the deceased Veerappa's estate, (*ii*) whether the appellant was entitled to any and what property in his own right as a member of his natural family, and (*iii*) whether he was assessed to property tax in the relevant years.

It only remains to deal with the appellant's claim for reduction of interests under the provisions of the Usurious Loans Act, 1918, as amended by the Usurious Loans (Madras Amendment) Act 1936. The amendment provides *inter alia* that in the case of loans to agriculturist, if compound interest is charged, the Court shall

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1. (1940) 2 M.L.J. 498.

presume that the interest is excessive Mr. Sampath Aiyangar claims that his client is an agriculturist and therefore the compound interest at 15 annas per mensem provided in Ex P-1 should be presumed to be excessive, and simple interest at a lower rate should be decreed It has been held by this Court in *Venkanni Chettiar & Sons* v *Shaik Muhammad Rowther*[1] that an agriculturist within the meaning of this Act is one who follows the calling of agriculture Mr Sampath Aiyangar suggests that, though a Nattukottai Chetti, the appellant was following the calling of agriculture as he was not carrying on any money-lending business It is, on the other hand, pointed out for the respondent that in an affidavit filed by the appellant in I A No 350 of 1944 dated 12th July, 1944, he described himself " as a money-lender by profession." This description by the appellant of his own calling concludes the point against him, especially as there is no reliable evidence to show that he was following the calling of agriculture. Mr Sampath Aiyangar finally suggested that, even apart from the claim to reduction based on the Madras Amendment, the contract rate which works out at 11½ per cent per annum is excessive. There is, however, no evidence to prove it. The Court below which is more familiar with the conditions of the local money-market has allowed that rate as not being excessive, and we are not disposed to interfere with its conclusion on the point.

The case will be remitted to the lower Court for submission of its finding on the points already mentioned The finding will be submitted within two months of the receipt of this order The parties will have liberty to adduce fresh evidence on the points Ten days for objection.

B V.V *Case remanded*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE WADSWORTH AND MR. JUSTICE RAJAMANNAR

Ramasubba Aiyar *Appellant**

v

Muthu KR. AR PL. Arunachalam Chettiar *Respondent*

Limitation Act (IX of 1908), Article 132—Charge declared by decree in favour of subrogee—Suit to enforce charge—Starting point of limitation

S, a creditor of *M*, the original owner of certain properties filed a suit to recover an amount due to him and obtained an attachment before judgment of the properties of the debtor including the suit properties, which were actually attached in March, 1917 Eventually he obtained a decree in the suit and his legal representatives brought the attached properties to sale and purchased them themselves on 8th April, 1929 *X* purchased the suit properties in 1920 from *N* to whom *M* had alienated the same in 1918 When the auction-purchasers proceeded to obtain delivery of the properties, they were obstructed by *X* who was in possession under his purchase from *N*

Meanwhile a mortgagee of *M* obtained a decree for sale and assigned the decree to *Y* There was another mortgage also on the properties *X* claiming to have discharged these encumbrances urged in the execution proceedings for delivery that in any event he was entitled to remain in possession till he was reimbursed in the amount paid by him to discharge the encumbrances subsisting on the property Ultimately on 28th August, 1931, the High Court ordered that possession should be delivered to the auction purchasers but made a declaration that *X* had a charge for the amounts paid by him to discharge the various mortgages In 1937 the auction purchasers sold the property to *A* and on 13th August, 1943, *X* instituted a suit to enforce the charge declared in his favour On a question as to limitation,

Held, that the right of *X* to subrogation became merged in the order of the High Court declaring the charge and the suit to enforce it was in time In the circumstances it is unnecessary to deal with the difficult question whether the starting point of limitation for a suit to enforce the right of subrogation by a puisne encumbrancer is the date of payment by him in discharge of the prior encumbrance or the date when the prior encumbrance itself became payable

Batey Krishna v *Parsotam Das*, (1944) 2 M.L J 330 L.R. 71 I.A. 153 : I.L.R (1944) All 654 (P C), relied on

Perumal Reddiar v *Suppiah Thevar*, (1945) 1 M L J 341, distinguished.

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1. (1943) 2 M.L J. 504.

* Appeal No. 574 of 1944. 18th January, 1946.

Appeal against the decree of the Court of the Subordinate Judge of Madura, dated 7th August, 1944, and passed in O S No 62 of 1943

B. Seetharama Rao and *P. S Sundaram* for Appellant

S Panchapagesa Sastri and *P. S Sarangapani Aiyangar* for Respondent.

The Judgment of the Court was delivered by

Rajamannar, J —This is an appeal by the plaintiff against the decree of the Court of the Subordinate Judge of Madura dismissing his suit for the recovery of Rs 5,100 by the enforcement of a charge on the properties mentioned in the plaint schedule These properties originally belonged to one Mecca Meera Levvai Rowther He had executed in favour of one Srinivasa Ayyar, two mortgages on 21st December, 1910, and 25th September, 1912, for Rs 2,000 and Rs 3,000 respectively The properties in suit and other properties were purchased by the plaintiff in 1920, from one Sikandar Rowther to whom the original owner had alienated these and other properties in 1918

One Syed Muhammad Rowther, a creditor of the original owner, brought a suit O S No 24 of 1917 on the file of the Court of the Subordinate Judge of Madura to recover an amount due to him and obtained an attachment before judgment of the properties of the debtor including the suit properties, which were actually attached in March 1917 Eventually he obtained a decree in the suit and his legal representatives brought the attached properties to sale and purchased them themselves on 8th April, 1929 The purchase by the plaintiff was therefore after this attachment before judgment When the auction purchasers proceeded to obtain delivery of the properties, they were obstructed by the plaintiff, who was in possession under his purchase from Sikandar

Srinivasa Ayyar obtained a decree for sale in O S No 146 of 1922, Sub-Court, Madura, on the foot of the two mortgages in his favour above-mentioned and assigned this decree to one Narayanaswami Ayyar. There was also a mortgage in favour of one Nagappa Chettiar executed by the original owner in 1917 The plaintiff claiming to have discharged these encumbrances urged in the execution proceedings for delivery that in any event he was entitled to remain in possession till he was reimbursed in the amount paid by him to discharge the encumbrances subsisting on the property The lower Court held that the purchase by the plaintiff could not prevail against the auction purchasers but directed the purchasers to pay to the plaintiff the amount alleged to have been paid by him in discharge of the mortgages on the property, before they obtained possession The auction purchasers preferred an appeal to this Court, C. M A No 465 of 1930 Madhavan Nair and Jackson, JJ , agreed with the contention on behalf of the auction purchasers that they were entitled to the possession of the properties unconditionally because the mortgages which the plaintiff claimed to have discharged were simple mortgages and not usufructuary mortgages They therefore set aside the order of the lower Court and ordered that possession of the properties should be delivered to the appellants before them free from the resistance of the present plaintiff With regard to his claim that he was entitled to be paid the amount which went to discharge the mortgages, the learned Judges observed as follows .

"Mr Seetharama Rao argues that as the respondent has discharged various mortgages the appellants may be asked to pay him in these very proceedings the amount of the mortgages discharged by him , but we think that as the respondent has no title to remain in possession of the property and as the appellants' right is undisputed he should enforce his right to recover the mortgage amount by other appropriate proceedings However, to safeguard his rights we will declare and this is not objected to by the appellants that the respondent will have a charge on the mortgaged properties with respect to the amount paid for the discharge of the various mortgages but in any proceedings which he may take to enforce his rights it is only right to say that the appellants will be entitled to raise whatever objections they might have raised on the date when they became the purchasers of the equity of redemption in the properties on 8th April, 1929 "

The decretal order gives effect to this direction and contains a declaration that the plaintiff do have a charge for the amounts paid by him to discharge the various mortgages

The date of the judgment and decree of the High Court in the C. M. A. was 28th August, 1931. In 1937, the properties in suit were purchased by the

present respondent from the auction purchasers. On 13th August, 1943, the plaintiff instituted the suit out of which this appeal arises for the recovery of a sum of Rs. 5,100 (to which amount he confined his claim) by enforcement of the charge thus declared by the High Court against the respondent who had become the purchaser of the properties

The learned Subordinate Judge of Madura held in favour of the plaintiff on all material issues except with regard to the plaintiff's claim in so far as it related to the discharge of the mortgage in favour of Nagappa Chettiar But having regard to the fact that though the total claim which the plaintiff could make in respect of the amounts alleged to have been paid by him amounts to over Rs 15,000 yet he has chosen to confine his claim to Rs 5,100, Mr. Seetharama Rao the learned counsel for the appellant intimated that it was not necessary to attack this finding. The learned Subordinate Judge, however, dismissed the suit on the ground that it was barred by limitation The plaintiff appeals

Admittedly the article applicable is Article 132 of schedule I to the Limitation Act The starting point according to the third column is "when the money sued for becomes due" The several alternative dates which may be pressed into service on behalf of the appellant or the respondent are

(1) The date when the amounts became payable under the mortgage ;

(2) The date when according to the plaintiff payments were made in discharge of the mortgage ;

(3) The date of the purchase by the defendant's predecessors in execution of the decree in O S No 24 of 1917, that is 8th April, 1929 ;

(4) The date of the disposal by the High Court of C M A No 465 of 1930, *i e*, 28th August, 1931 ; and

(5) The date when the plaintiff was dispossessed of the suit properties, that is, 30th November, 1931

The suit would be barred unless either of the last two alternatives is taken as the starting point The payments were in 1923 and any suit on the foot of the mortgages themselves would be hopelessly barred on the date of the institution of the present suit

For the appellant, a recent decision of the Privy Council in *Batey Krishna* v. *Parsotam Das*[1] was relied on for the position that the date of the High Court's decree is the proper starting point In our opinion this decision should govern the present appeal. In that case the plaintiff became owner of certain property by virtue of a purchase on 27th July, 1910 In 1909 the original owner had executed a mortgage which was payable in 1912 and in 1915 he executed another mortgage over a part of the properties already mortgaged There was a suit instituted on the mortgage of 1909 and a decree for sale obtained In order to save the properties from being sold in auction, the plaintiff paid to the mortgagee-decree-holder in 1917 the decretal sum The plaintiff also redeemed another mortgage which had been executed by the original owner in 1915 by a payment made in 1917 There was then a suit filed by subsequent mortgagees for foreclosure To this suit the plaintiff was also made a party, and he put forward a claim in respect of the payments made by him to discharge the prior encumbrances This claim was recognised and a charge was declared in his favour and presumably incorporated in the decree The plaintiff thereafter brought a suit for the enforcement of the charge within 12 years of the decree in the foreclosure suit but beyond 12 years of the payments made by him The Allahabad High Court dismissed the suit as barred by limitation because it was beyond 12 years both from the date when the mortgages discharged by him became payable and from the date of payment Their Lordships of the Judicial Committee allowed the appeal and held that the foreclosure decree created a charge in favour of the plaintiff which could be made the basis of his suit It was contended before them that the decree only declared a charge which had existed before but did not create one, but their Lordships were unable to accept this argument. They say :

1 (1944) 2 M L J. 330 : L.R 71 I A. 153 I.L R. (1944) All 654 (P C).

"The plaintiff by making the two payments mentioned above had subrogated himself to the rights of the mortgagees whom he paid off, and the rights which he had thus obtained became merged in the decree passed by the Subordinate Judge in the foreclosure suit In the circumstances it is clear to their Lordships that the rights which the defendants have obtained can only be subject to the qualification of the rights of the plaintiff, i e , a charge in favour of the plaintiff must be held to have been created by the final decree in Suit No 13/39 of 1927 (the foreclosure suit) "

The facts of the present case are similar Here too though it may be said that the plaintiff by reason of the payments had the right to recover them, it must be held that his right became merged in the order of the High Court which declared a charge in his favour In this view it is unnecessary to refer to the decisions which deal with the difficult question whether the starting point of limitation for a suit to enforce the right of subrogation by a puisne encumbrancer is the date of payment by him in discharge of the prior encumbrance or the date when the prior encumbrance itself became payable

Mr Panchapagesa Sastri for the respondent tried to whittle down the declaration granted by the High Court in favour of the plaintiff to a mere observation or *obiter dictum* which could not be made the foundation of the present suit We do not agree with him The learned Judges make it abundantly clear that they were granting a declaration to safeguard the rights of the plaintiff who was indisputably entitled to the right on account of his discharge of the mortgages on the property It is not a case of a mere observation because there was a specific direction incorporated in the decretal order

We do not also agree with the respondent that in respect of this declaration it is open to him to urge that on the date of the order of the High Court the appellant had no subsisting charge An acceptance of this argument would mean the negation of a right declared by the High Court. We do not understand the qualification made by the High Court allowing the respondent's predecessors to raise objections which they might have raised on the date of their purchase of the equity of redemption in Court auction to mean that such objections could be in the total denial of the plaintiff's claim.

Mr. Panchapagesa Sastri relied on a decision of Horwill, J , in *Perumal Reddiar* v *Suppiah Thevar*[1], which no doubt was after the pronouncement of the judgment of the Privy Council in *Batey Krishna* v *Parsotam Das*[2], but in that case there was no question of an antecedent declaration of a charge in favour of the plaintiff as in the present case.

It was also urged for the respondent that the date of the purchase by the respondent's predecessors in execution of the decree in O. S No 24 of 1917, that is 8th April, 1929, should be the date from which time should be reckoned It is true no doubt on that date there was a purchase by the defendant's predecessors but the plaintiff continued to remain in possession and when his possession was threatened he did put forward a claim in execution proceedings and the Courts therein did work out the relative rights of the plaintiff and the auction purchasers and the final result was the declaration made in favour of the plaintiff by the High Court From the date of that declaration the suit is in time.

We therefore disagree with the learned Subordinate Judge of Madura that the suit is barred by limitation and set aside the dismissal of the suit.

On the merits, a point was sought to be made for the respondent that the respondent would be entitled to a right of contribution or at any rate to a diminution of the liability because of two facts (1) The exclusion of about 20 acres in item 2 from delivery of possession to the auction purchasers which continued to remain in plaintiff's possession and (2) about 2 acres 53 cents were purchased by one Venkateswara Ayyar at a revenue sale This is a question which cannot be decided now for the first time We do not find it raised specifically in the written statement and there was no issue framed to cover this contention It also appears to us that this contention was presumably not raised because the plaintiff was claiming only an amount of Rs 5,100 though his total claim was over Rs 15,000 and any

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1 (1945) 1 M L J 341 I L R (1944) All 654 (P.C)
2. (1944) 2 M L J. 330 L R 71 I.A. 153 :

reduction on the grounds alleged by the respondent could not further reduce the plaintiff's already reduced claim.

We therefore allow the appeal and grant a decree in favour of the plaintiff for a sum of Rs 5,100 with further interest at 6 per cent from the date of plaint with costs here and in the Court below Time for redemption—three months.

K.S *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA AND MR JUSTICE YAHYA ALI

K. P RM Kuppan Chettiar *alias* Kadiresan Chettiar *Appellant**

v

SP R M RM. Ramaswami Chettiar and another *Respondents.*

Contract Act (IX of 1872), section 124—Indemnity implied by law—Benamidar—Passing of receipt by benamidar at the request of one of the true owners without receiving money—Person passing receipt compelled to pay share of other real owner—Right to be indemnified by benamidar

Civil Procedure Code (V of 1908), section 11—Applicability—Earlier suit decreed in second appeal against a defendant who remained ex parte *in trial Court after the co-defendant had been exonerated—Subsequent suit by such defendant who was compelled to pay decree amount, for indemnity against exonerated co-defendant—Not barred.*

R was the maternal uncle of *K* and *S* was the brother of *R's* wife. The family of *R* were the melvaramdars of Pappankulam village and there were certain promissory notes executed by the ryots of that village in the name of *R's* father In 1910 a mortgage was taken in the name of *K's* father in discharge of *those* promissory notes, the mortgage being for the benefit of *R's* family The mortgagors created a usufructuary mortgage dated 9th December, 1917, in favour of *X* for Rs 4,800 and directed *X* to discharge the first mortgage of 1910 This was not done and *X* sub mortgaged his right in favour of *S* The consideration for this sub mortgage was the undertaking to discharge the debt under the 1910 mortgage *S* did not discharge the 1910 mortgage but took on 9th February, 1922, an assignment from *X's* widow of the rights of *X* in the 1917 mortgage Thus the rights of *X* became vested in *S* It was found that the sub-mortgage and assignment in favour of *S* were really for the benefit of *R's* family *R* and *M* his elder brother had two other brothers and all the four of them were entitled to their father's properties and at a partition the family right in Pappankulam village and the amounts due from the ryots including the amount under the 1910 mortgage were allotted to the shares of *R* and *M* who became entitled to a half share each There were other moneys due to both and *M* who was collecting them was not rendering accounts to *R* On the 1st March, 1922, a registered receipt was executed by *K* in favour of *S* for the full sum due under the 1910 mortgage *M* then filed in 1926 a suit against *R*, *K* and *S* for the recovery of a half share of the properties which were te subject of the usufructuary mortgage of 1917 and wanted a half share in that the usufructuary mortgage rights on the footing that *S* was merely a benamidar for *R* and his brother *M* and in the alternative wanted relief against *K* The alternative case was that as a receipt for the amount due under the 1910 mortgage was passed by *K* and as the amount really belonged to *M* and *R* in equal shares, *M* was entitled to recover half that amount from *K* The suit was defended by *R* and *S* but *K* remained *ex parte* in the trial Court being apparently not interested in the primary relief that was claimed against *R*. Further, *M's* allegation in the plaint was that no money was in fact paid for the receipt of 1st March, 1922 The first Court decreed joint possession in favour of *M* After the filing of the suit a document dated 28th October, 1925, was executed by which *K* for some reason promised *M* that in case he did not succeed against *R*, *K* himself would pay *M* a half share of the amount due under the 1910 mortgage This was brought to the notice of the District Judge who passed a decree against *K* without any further notice to him for half the amount on the strength of the new document *K* took up the matter in second appeal where it was held that a decree based on the new document was unsustainable and remanded the suit as far as *K* was concerned and dismissed the appeal against *R* and *S* The District Judge was directed to submit a finding on the evidence on record whether *K* collected the amount under the receipt A finding was returned that money had been paid This was based on evidence at the trial where *K* had remained *ex parte* The finding was accepted and a decree for half the amount with subsequent interest was passed in favour of *M* against *K* *M* collected the amount from *K*

K then sued *R* to recover from him the amount paid to *M* alleging that *R* asked him to execute the receipt stating that no serious consequences would result to *K* and that it was executed purely to oblige *R* without receiving a single pie

Held, (i) As *K* was, in consequence of his having complied with the request of *R*, made liable to *M* in the previous suit, *K* is entitled to be indemnified by *R* in respect of the loss sustained It cannot be said that in passing the receipt *K* was guilty of negligence or that he was acting with the knowledge that he was doing an unlawful act If the circumstances are such that the law imposes

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* Appeal No 412 of 1944 15th January, 1946

on any person a legal or equitable duty to indemnify it will imply a promise on his part to do that which under the circumstances he ought to do

Principles as to implied indemnity and English authorities discussed.

When a benamidar pays the amount to one of the joint real owners or passes a receipt to one of them it does not necessarily mean that he was acting in fraud of the rights of the other real owner

(ii) The doctrine of *res judicata* does not apply in the present case There was no conflict of interest between *K* and *R* as co-defendants in the earlier suit Further the decree in the earlier suit was passed against *K* on second appeal after *R* and *S* had been exonerated and dismissed from the suit

Appeal against the decree of the Court of the Subordinate Judge, Sivaganga, in O S No 17 of 1943

A Sundaram Ayyar for Appellant

The Advocate-General (*K Rajah Aiyar*), *K V Srinivasa Aiyar*, *S Panchapagesa Sastri*, *M R Narayanaswami* and *S Sundaresa Aiyar* for Respondents

The Judgment of the Court was delivered by

Somayya, J—Plaintiff appeals against the decree of the Subordinate Judge of Sivaganga in O. S. No 17 of 1943 The suit is to recover a sum of Rs 8,685 with further interest and costs from the first respondent Ramaswami Chettiar The suit was dismissed by the lower Court and hence this appeal

In order to understand the controversy between the parties, it is necessary to set out a fairly long history The appellant's mother's brother is the first respondent. The second respondent Somasundara is the first respondent's wife's brother. The family of the first respondent were the melvaramdars of the village of Pappankulam and Ex P-1 series are certain promissory notes executed by the ryots of that village in the name of the first respondent's father and Meyyappa who is the elder brother of the first respondent In 1910 a mortgage was taken in the name of the appellant's father Raman Chetti in discharge of Ex P-1 series and that was for the benefit of the first respondent's family No money was paid by the mortgagee to the first respondent's father or to his brother Meyyappa and admittedly it was taken for the benefit of the first respondent's family consisting of his father and two sons Ex P-2 dated 22nd July, 1910, is the mortgage executed in the name of the appellant's father The mortgage was executed by the Pappankulam ryots who were the debtors under Ex P-1 series The mortgagors under Ex P-2 created a usufructuary mortgage under Ex P-4 dated 9th December, 1917, in favour of Muthuraman Chetti for a sum of Rs, 4,800 and directed Muthuraman Chetti to discharge Ex P-2 This was not done and Muthuraman Chetti sub-mortgaged his right under Ex P-4 in favour of the present second defendant —second respondent Consideration for this sub-mortgage was the undertaking to discharge the debt under Ex P-2. Second respondent did not pay the amount due under Ex P-2 as undertaken by him in the sub-mortgage, Ex P-5, but he took an assignment of the rights under Ex P-4 from Muthuraman Chetti's widow by means of Ex P-6 dated 9th February, 1922 Thus the rights of Muthuraman Chetti became vested in the second respondent It is found by the lower Court that the sub-mortgage under Ex P-5 and the assignment under Ex P-6 were really for the benefit of Ramaswami, the first respondent. Ramaswami and Meyyappa, his elder brother, were entitled to the properties left by their father and they had two other brothers and all the four of them were entitled to their father's properties The family right in Pappankulam and the amounts due from Pappankulam ryots including the amount under Ex P-2 were allotted to the shares of the first respondent Ramaswami and of Meyyappa, the other brother, at a partition between the four brothers Meyyappa therefore became entitled to a half share in the hypothecation under Ex P-2 along with his brother, the first respondent It would appear that there were also certain other moneys which were due to both and that Meyyappa was collecting them and was not rendering an account of his collections to Ramaswami, the first respondent. On the 1st March, 1922, Ex P-9 was executed by the appellant which is registered receipt for the full sum due under Ex P-2 and purport of it is that the appellant received the entire amount from the second respondent Somasundara Meyyappa then

filed O. S. No 10 of 1926 against Ramaswami the first respondent, the appellant Kadiresa and the second respondent Somasundara They were defendants 1, 2 and 3 in that suit In that suit Meyyappa wanted recovery of a half share of the properties which were the subject of the usufructuary mortgage Ex P-4 and of the assignment Ex P-6 on the footing that Somasundara the second respondent was merely a benamidar for Ramaswami the first respondent and that Ramaswami in taking those documents acted really for the benefit of both Meyyappa and himself. On this footing Meyyappa wanted a half share in the usufructuary mortgage right and asked for joint possession of the properties. In the event of the Court finding that Meyyappa was not entitled to a half right in the usufructuary mortgage and for possession of half the properties covered by that document, Ex P-4 Meyyappa wanted a relief against the present appellant Kadiresa. The alternative case was that as a receipt for the amount due under Ex. P-2 was passed by Kadiresa the second defendant in that suit, and as the amount really belonged to Meyyappa and his brother Ramaswami in equal shares Meyyappa was entitled to recover half of that amount from Kadiresa the present appellant The suit was defended in the trial Court by Ramaswami and Somasundara the second respondent The present appellant Kadiresa remained *ex parte* in the trial Court He apparently was not interested in the primary relief that was claimed against the first defendant in that suit In passing we may mention that Meyyappa's allegation in the plaint was that no money was in fact paid for the receipt of the 1st March, 1922 That perhaps was the reason why the present appellant thought that there was no necessity for him to enter appearance or to take part in the trial of the suit The first Court held that the mortgage right acquired by Ramaswami the first respondent in the name of his brother-in-law the second respondent was really for the benefit of Meyyappa as well and therefore decreed joint possession in favour of Meyyappa There was an appeal taken against that decree Mr R S Sankara Aiyar the then District Judge who heard the appeal came to the conclusion that Meyyappa was not entitled to a right in the usufructuary mortgage, because Meyyappa's evidence was that Ramaswami was acting in fraud of Meyyappa's rights and that that showed that Ramaswami did not intend to acquire the usufructuary mortgage right for the benefit of himself and his brother Meyyappa The District Judge therefore thought that the only remedy of Meyyappa was to recover his half share in the mortgage amount due under Ex P-2 from Kadiresa the present appellant who had also been made a respondent in the appeal before him The attention of the District Judge was drawn to a document which had been executed after the filing of the previous suit by the present appellant in favour of Meyyappa That is Ex P-21 dated 28th October, 1925 Under that document, the present appellant for some reasons promised Meyyappa that in case he did not succeed against Ramaswami, he the appellant would pay Meyyappa a half share of the amount due under Ex. P-2. This was brought to the notice of Mr R S Sankara Aiyar and without any further notice to the present appellant and on a statement made by Meyyappa and Ramaswami, the District Judge passed a decree against the appellant for half the amount due under Ex P-2 The decree in favour of Meyyappa against the present appellant was based solely on Ex P-21 Coming to know of this decree, the appellant took up the matter in second appeal (No 676 of 1932) That was heard by Lakshmana Rao, J The learned Judge held that a decree ought not to have been passed on the strength of a document which was not the basis of the suit, and that as Ex P-21, which was Ex J, in the previous case had not even come into existence on the date of the plaint, the suit was not and could not have been based on that document. Lakshmana Rao, J, held that as the suit was not based on Ex. J (present Ex P-21), the appellate decree passed on the basis of that agreement cannot be upheld Without saying anything more, the appeals were remanded to the District Court There were apparently two appeals We are not concerned with the details of these appeals and the question raised in both the appeals was substantially the same After remand the appeals were dealt with by Mr S P Thompson who was the then District Judge. He pointed out that Meyyappa had not alleged in his plaint that the money due under Ex. P-2 had been collected and that on the other hand, Meyyappa

had pleaded expressly that no money had been paid under the receipt Ex. P-9. He held that therefore Meyyappa was not entitled to get any relief against the present appellant. The matter was brought up by Meyyappa to this Court in S. A No 988 of 1937 It was first heard by Venkataramana Rao, J, who directed the papers to be placed before Lakshmana Rao, J When the matter came before Lakshmana Rao, J, he first dealt with the question whether Mr Thompson's order holding that the order of remand passed in the previous S. A. No. 676 of 1932, was confined to the present appellant was right Lakshmana Rao, J, agreed that the order of the District Judge was right and that the previous order of remand in S A No. 676 of 1932 was confined to the present appellant He therefore dismissed the second appeal against Ramaswami and Somasundara He then directed the District Judge to submit a finding on the evidence on record whether the present appellant collected the amount under the receipt Ex P-9 This time the matter came before another District Judge, Mr N D Krishna Rao. He returned a finding to the effect that money had been paid basing his finding on the evidence that had been adduced at the original trial which, as we pointed out above, was at a time when the present appellant had not even appeared in the case However, the finding was that the money was collected under the receipt. After return of the finding Lakshmana Rao, J, accepted the finding as one of fact and granted a decree for half the amount covered by the receipt in favour of Meyyappa Subsequent interest was also awarded Meyyappa collected the amount with subsequent interest and costs from the present appellant on 24th August, 1942. The present suit is to recover the amount paid to Meyyappa from Ramaswami the first respondent. The plaint allegation is that Ramaswami asked the appellant to execute the receipt Ex P-9 stating that no serious consequences would result to the plaintiff by executing a receipt and that the receipt was executed purely to oblige the first defendant without receiving a single pie under it [see paragraph 11 (*e*)]. The plaintiff's case is that as the receipt was executed at the instance of and at the request of the first respondent and as the appellant was made liable to pay Meyyappa the amount collected under the previous decree by reason of the receipt Ex P-9, the appellant is entitled to recover the amount from the first respondent. The main defence is that money was in fact collected by the appellant under the receipt Ex P-9, that the plaintiff's claim is barred by *res judicata* by reason of the finding in the previous suit and that the appellant has no right to recover the amount which he was obliged to pay to Meyyappa as a result of the decree in the previous suit Another defence was that the assignment of the usufructuary mortgage under Ex P-6 was really for the benefit of the second respondent Somasundara. The lower Court found that Ex P-2 the original mortgage was taken in the name of the appellant's father benami for Raman Chetti, the father of Meyyappa and Ramaswami, that Ex P-6 the deed of assignment of the usufructuary mortgage Ex P-4 was taken in the name of Somasundara *benami* for Ramaswami the first respondent, that no money was in fact paid under Ex P-9, and that no money was received by the appellant thereunder The lower Court however held that the appellant cannot recover the amount which he paid under the previous decree. The ground of the decision of the lower Court is that the appellant has no cause of action against the first respondent

The case seems to have been presented in the lower Court as one falling under sections 69 and 70 of the Contract Act and the Subordinate Judge rejected that contention. Mr. A Sundaram Aiyar, the learned Advocate for the appellant, has presented the case before us from another standpoint and that is that the appellant passed a receipt Ex P-9 at the instance of the first respondent, that the appellant was, in consequence of his having complied with the request of the first respondent made liable to Meyyappa in the previous suit and that therefore the appellant is entitled to be indemnified by the first respondent in respect of the loss so sustained. A number of decisions have been brought to our notice and after hearing the Advocate-General for the respondents, we think that this contention is bound to prevail. The law is summarised by Chitty in his work on "Contracts" (19th edition, page 823) :

"In many cases the law implies a promise to indemnify If the circumstances are such that the law imposes on any person a legal or equitable duty to indemnify, it will imply a promise on his part to do that which under the circumstances he ought to do."

Several instances of the application of this doctrine are given by the learned author. It is pointed out that this principle is not confined to cases of contract or to cases of principal and agent, landlord and tenant, vendor and vendee or *cestui que trust* and trustee It is a general rule which applies to all cases where at the instance of *A*, *B* does an act which is apparently lawful but which is in fact tortious and *B* suffers in consequence and the circumstances are such that a promise to indemnify must be presumed The rule is well laid down by the Judicial Committee in *Eastern Shipping Co* v *Quah Beng Kee*[1] There the owners of a wharf granted the appellant company the right to berth their ships at the wharf subject to liability for any damage caused The respondent was the managing director of the appellant-company and he gave instructions, without the company's authority, that a ship which he himself had chartered for his own benefit should berth at the wharf. Owing to the unskillful way in which the ship was unloaded the wharf collapsed. In an action by the owners of the wharf against the appellant-company for damages, they served a third party notice upon the respondent and claimed that he should be made to indemnify them against any damages for which they may be made liable to the owners of the wharf The question was whether the company had a right of indemnity against the respondent The law was discussed by the Judicial Committee and on page 182 their Lordships say this

"A right to indemnify generally arises from contract express or implied, but it is not confined to cases of contract A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do The right to indemnity need not arise by contract, it may (to give other instances) arise by statute, it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him, it may arise (to use Lord Eldon's words in *Waring* v *Ward*,[2] a case of vendor and purchaser) in cases in which the Court will 'independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation' of the vendor The question of indemnity commonly arises in the case in which a trustee claims to be indemnified by his *cestui que trust* This class of cases was particularly discussed by Lord Lindley in *Harddon* v *Belilios*[3] The present case is the converse The *cestui que trust* is here claiming to be indemnified by the trustee Beng Kee has been found to stand in fiduciary relation to the Eastern Shipping Co, and the latter claim indemnity from him in respect of liability imposed upon them by his abuse of powers in the exercise of which he owed them a duty and was responsible as a trustee of those powers He was not a trustee in the full sense of that word No property was vested in him But he was a trustee of his powers in the sense that they were vested in him in such manner that he stood in a fiduciary relation to the company in respect of his exercise of those powers"

Some of the earlier cases which throw a light upon the facts of the present case may now be referred to In *Dugdale* v. *Lovering*[4], the plaintiffs were in possession of certain trucks which were claimed by the defendant, and also by the proprietors of the K P Colliery The defendant asked the plaintiff to deliver the trucks to him and the plaintiffs asked for an indemnity that if they should deliver up the trucks to the defendant, and the K P Colliery thereafter claimed the same from the plaintiffs, the defendant should be liable for all the loss sustained by the plaintiffs. The defendant did not give any answer to this request for an indemnity but again wrote to the plaintiffs asking them to send the trucks to him. The plaintiffs thereupon sent the trucks to the defendant. The K. P Colliery proprietors then brought an action against the plaintiffs for conversion of the trucks and their claim was found to be well founded. The plaintiffs were in consequence obliged to pay a sum of money and they filed a suit to recover the amount upon a contract of indemnity, and it was held that the plaintiffs were entitled to it. It would be observed that there was no express contract of indemnity on the part of the defendant. In fact the plaintiffs asked the defendant to indemnify them and the defendant did not

1 (1924) A C 177
2 (1802) 7 Ves 332 (336) 32 E R 136
3 (1901) A C 118
4. (1875) L R 10 C P 196

reply and therefore there was no case of an express contract of indemnity All that happened was that at the request of the defendant, the plaintiffs delivered possession of the trucks to the defendant It ultimately turned out to be tortious in that the K P Colliery Co, were found to be the real owners and that the plaintiffs' action in delivering them to the defendant was in fact unlawful The plaintiffs had to pay a sum of money to the K P Colliery Co , and thereupon they filed the suit for recovering the same from the defendant The action was tried with the help of the jury and the jury held that the plaintiffs were entitled to be indemnified against the loss which they sustained The matter was brought up to the High Court and Brett, J , put the point thus .

"The Court is not entitled to enter a non-suit if there was reasonable evidence for the jury of a contract to indemnify It is clear from the correspondence that the plaintiffs delivered these trucks to the defendant upon the request of the defendant, and it is also clear that they belonged in truth to the Kiveton Park Colliery Co , who have made the plaintiffs answerable for such delivery Under these circumstances, does there arise an implied promise by the defendant to indemnify the plaintiffs?"

Then they considered the several earlier decisions One of the decisions which Brett, J , referred to is that of *Toplis* v. *Grane*[1], where Tindal, C J , had decided the point Brett, J , referring to that decision said this .

"After the judgment in *Betts* v *Gibbins* , which, following the two former cases, laid down the principle upon which the implication of an indemnity arises in the broadest terms, there came the case of *Toplis* v *Grane*[1], in which Tindal, C J , one of the most careful expositors of the law ever known, laid down the proposition on the subject in these terms 'We think this evidence brings the case before us within the principle laid down in *Betts* v *Gibbins*[2], that when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself, but is done honestly and *bona fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof' "

Then Brett, J , repelled an argument that was put forward that such an indemnity is confined to cases of agents Dealing with the facts of the case the learned Judge said this :

"From these letters, I think the jury might well have found that the plaintiffs were justified in believing, and did believe, that the defendant would indemnify them if they incurred liability".

Grove, J , agreed with this decision and said this

"In some cases, no doubt, a general proposition stated in a judgment must be limited by reference to the subject-matter, but that is where the proposition would be obviously unreasonable unless so limited I do not find that in these cases there is anything to show that the expressions must be limited to the case of agency I should hesitate to say that in cases of this sort it can be an absolute proposition of law that the party making the request is bound to indemnify Whether there is such an obligation must greatly depend on the circumstances of each individual case, the effect of which seems to be for the jury to determine "

After referring the facts of the case, Grove, J , agreed with Brett, J , that the facts of that case gave rise to a promise to indemnify

In *Birmingham and District Land Co* v *London and N W Railway, Co.*,[3] the Court of Appeal laid the law in similar terms At page 272, Cotton, L J , expressed himself thus after dealing with the cases of express contract and trustees and *cestui que trust*

"Then, is there any ground of indemnity? Of course, if *A* requests *B* to do a thing for him, and *B* in consequence of his doing that act is subject to some liability or loss, then in consequence of the request to do the act the law implies a contract by *A* to indemnify *B* from the consequence of his doing it In that case there is not an express but an implied contract to indemnify the party for doing what he does at the request of the other "

On the facts they found that there was no such contract of indemnity Bowen, L J , put the matter thus :

"In nine cases out of ten a right to indemnity, if it exists, at all as such, must be created either by express contract or by implied contract, by express contract if it is given in terms by the contract between the two parties , by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many

1 (1839) 5 Bing N C 636 132 E R 1245
2 (1834) 2 Ad & E 57 111 E R 22
3 (1886) 34 Ch D 261

cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do."

In *Lord Mayor, etc., of Sheffield* v *Barclay*[1], *T* and *H* were two registered holders of a stock in a particular corporation. A banker (Barclay Bank) sent an application for the transfer of the stock which purported to be executed by both *T* and *H*, and requested the corporation to register the stock in the name of the banker. The Corporation acted upon the request and granted a fresh certificate to the banker and the banker transferred the stock to third parties and they were registered as holders. Afterwards it was discovered *T* had forged *H's* signature and *H* recovered against the Corporation a judgment whereby they were compelled to buy equivalent stock and register it in *H's* name, and to pay him the missing dividends with interest. In an action by the Corporation against the Barclay Bank it was held that both parties acted *bona fide* and that the banker was bound to indemnify the corporation against liability to *H* upon an implied contract that the transfer was genuine and the contract was held to be one to indemnify the Corporation against any loss which it may sustain in consequence of its transferring the shares at the request of the bank. The Lord Chancellor said this at page 397:

"As I have said, I think if it were *res integra* I should think the bank were liable, but I do not think it is *res integra*, but is covered by authority. In *Dugdale* v *Lovering*[2] Mr Cave arguing for the plaintiff put the position thus: 'It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.' This though only the argument of Counsel, was adpoted and acted upon by the Court, and I believe it accurately expresses the law. Qualifications have been constantly introduced into the discussion which I think have led to some confusion; they are not really qualifications of the principle here enunciated at all, but the expression of principles which would render the application of principle in question erroneous. One qualification is that there is no right of contribution between tortfeasors, and the other is to distinguish the right insisted upon from the ordinary remedy in damages against a person who has caused injury by intentional falsehood."

Lord Davey agreed with the Lord Chancellor and at page 401 we find this:

"In some cases it is a question of fact whether the circumstances are such as to raise the implication of a contract for indemnity; but in cases like the one now before your Lordships when a person is requested to exercise a statutory duty for the benefit of the person making the request I think that the contract ought to be implied."

The learned Advocate-General appearing for the respondent seeks to distinguish the present case on the ground that the appellant knew the facts of the case and knew that his act in executing Ex P-9 was an unlawful act and that he was actively assisting the first respondent in playing a fraud upon Meyyappa. It is urged that the appellant was not well-disposed towards Meyyappa for the reason that Meyyappa was standing in the way of the appellant getting the properties left by his father and that that was the motive which prompted the appellant in executing Ex P-9, without receiving any money thereunder. It is also pointed out that later on the appellant tried to help Meyyappa and executed Ex P-21 and that the whole trouble was the result of the appellant's own action in trying to support one brother against the other at different stages of this transaction. He relied upon the decision in *William Cory and Sons, Ltd* v *Lambton and Hetton Collieries, Ltd*[3]. There the plaintiffs were the Charterers of a ship and the defendants were the owners of that ship. The plaintiffs removed certain hatch beams on behalf of the ship-owners and while so removing them an accident occurred and a third party was injured. The plaintiffs were obliged to pay damages to the third party and the action was brought to recover that sum from the ship-owners. The doctrine laid down in *Dugdale* v. *Lovering*[2], was sought to be pressed into service. Repelling the case of the plaintiffs the learned Judges pointed out that the ship-owners asked the plaintiffs to effect certain repairs and that that was a perfectly lawful act. The plaintiffs acted negligently in the carrying out of that act and were therefore held liable to a third party. The damages which the plaintiffs were held liable to pay to the third

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1 (1905) A C 392.
2 (1875) L R 10 C P 196.
3 115 L T 738.

party was not the result of the removal of the hatch beams being held to be in violation of third party's rights. Therefore it was not a case where at the request of *A*, *B* did an act which was apparently lawful but which in fact was tortious being an invasion of another person's rights and *B* being obliged to pay that third person some amount by way of damages. The plaintiffs were authorised by the owners of the ship to remove the hatch beams and that act which the defendants, the owners of the ship, authorised was a lawful act and continued to be a lawful act and it was not an invasion of another person's rights On this ground the learned Judges held that the doctrine laid down in *Dugdale* v *Lovering*,[1] was not applicable Swinfen Eady, L J, after referring to the argument based upon *Dugdale* v *Lovering*[1], said this :

"Then it is said that this Act was done by the plaintiffs, William Cory and Sons, Ltd., under the express direction or under the implied directions—it is immaterial whether it is express or implied if it was under the directions—of the defendants, and they say that that has occasioned an injury to the rights of a third person, the deceased workman, Peacock, so that if the act is not apparently illegal, but is done honestly and in good faith then the defendants are bound to indemnify the plaintiffs against the consequences thereof Mr Rawlinson and Mr. Macnaghten have urged before us that this case clearly comes within the principle as there laid down.

In my opinion it does not, and I am satisfied that in the present case there was no evidence to go to the jury of any implied indemnity by the defendants, the ship owners in respect of any liability of the plaintiffs, William Cory and Sons, Ltd, to their workmen under the Workmen's Compensation Act The statement of the law which I have just read, in which it is held that the defendant is bound to indemnify the plaintiff against the consequences thereof, must be read as meaning that the plaintiff claiming the indemnity must have acted without negligence, and that the injury to the third party, when it says 'the consequences thereof' must be the direct result—that is, the natural and direct consequences—of doing the particular act which he was requested to do, and not a consequence merely arising from the manner in which the act was done"

As all the judges pointed out, the first condition is that the Act must have been done at the request of the defendants Next that the act itself must have been in fact tortious, *i e*, it must be an invasion of another person's rights It is only then that any occasion would arise for the application of the doctrine laid down in *Dugdale* v *Lovering*[1] They rightly repelled the contention that from the mere fact that one person does an act gratuitously without a request from another person the law would imply a contract to indemnify Bankes, L J, said this

"But Mr Macnaghten had advanced another and different argument, as I understand it, and his contention is that where request is made to a person to do an act gratuitously, and he does that act gratuitously, the law implies a contract to indemnify him against all the consequences of that act, whatever they may be—it may be that in some cases the fact that the service is done gratuitously may be an element for consideration I am expressing no opinion about that, but I say that, so far as my opinion goes, it is impossible to contend, and there is no authority to contend, that the law implies such a contract as Mr Macnaghten contends for, from the mere fact that the person performing the act is doing it gratuitously"

Lawrence, J, put the matter thus

"Mr. Rawlinson applies the doctrine of *Dugdale* v *Lovering*,[1] but the doctrine is applicable to different facts altogether There the request was to do an act that was apparently quite lawful, but was in fact tortious, and it is the same thing in the case cited in that case of Tindal, C J, which is mentioned there, the act was in fact illegal, though it was not known to be so, and it was from that that the indemnity was implied But there the request was to do a perfectly lawful act, and there was, therefore, no implied promise of indemnity"

In the present case, we are of opinion that the appellant granted Ex P-9 at the request of the first respondent He did so without receiving any amount and the result of his passing Ex P-9 was an invasion of the right of Meyyappa and was therefore a tortious act There are no materials for holding that the appellant was guilty of negligence or that he was acting with the knowledge that he was doing an unlawful act When a benamidar pays the amount to one of the joint real owners or passes a receipt to one of the joint real owners, it does not necessarily mean that he was acting in fraud of the rights of the other real owner

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1. (1875) L R 10 C.P. 196

Our attention was drawn by the learned Advocate-General to the deposition of the appellant in support of his case that the appellant deliberately colluded with the first respondent in executing Ex P-9 and that the reason was a grudge which the plaintiff appellant bore towards Meyyappa The passage is this ·

"I executed the receipt original of Ex P-9 Defendant 1 wanted me to execute it He represented that Meyyappa Chetti was collecting the outstandings of Pappangulam and was not giving him anything and so asked me to execute the receipt in the name of his brother-in-law defendant 2. I said I could not execute any document without records Then he produced a copy of the hypothecation bond. As the property was not mine I executed the receipt herein. I had not received any copy of the hypothecation bond"

Certain passages from the cross-examination of the appellant were brought to our notice but all that we gather from it is that the first respondent said that Meyyappa was not acting fairly by him and that therefore the first respondent asked the appellant to execute the receipt in question We do not think that there are any circumstances proved to take the present case out of *Dugdale* v. *Lovering*[1]

It was then argued that the appellant did in fact collect the entire sum from the second respondent. The lower Court has found against this contention and we see no reason to differ from the finding of the Subordinate Judge on this point.

It is then urged that the appellant is precluded from contending that he did not receive the amount by reason of the judgment in the previous suit where it was held that the appellant received the amount In the previous suit, O S No 10 of 1926, the present appellant and the first respondent were both defendants The requisite conditions for the applicability of the doctrine of *res judicata* as between co-defendants are laid down by two decisions of the Judicial Committee in *Munnibibi* v. *Trilokinath*[2], and *Maung Sein Done* v. *Ma Pan Nyun*[3]. These are (1) a conflict of interest between co-defendants, (2) necessity to decide that conflict in order to give the plaintiff appropriate relief, and (3) a decision on the question between the co-defendants If these conditions are present, it does not matter even if one of the defendants did not appear at the trial or did not even contest the suit and remained *ex parte*

Difficulty has arisen in the application of this rule to the facts of a particular case. In the present case, we are of opinion that the doctrine of *res judicata* does not apply. In O S No 10 of 1926, two reliefs were asked by the plaintiff, one which may be called the primary relief and the other an alternative relief The primary relief was based upon the contention that the first respondent in taking an assignment of the usufructuary mortgage acted for and on behalf of the plaintiff, Meyyappa as well On that footing the relief asked was one of joint possession along with the first respondent and a declaration of his rights to a half of the right under Ex P-4 Meyyappa's allegations as regards the primary relief was that no amount was paid under Ex P-9 and that the first respondent's action in getting an assignment of Ex P-4 enured for the benefit of both the brothers. In an enquiry of this question and in the decision thereof, the appellant had no interest whatever. He was not concerned with the question whether the usufructuary mortgage right under Ex P-4 was acquired by the first respondent for his sole and exclusive benefit or whether it became the joint property of the two brothers The alternative relief was that in the event of the Court holding that the plaintiff Meyyappa was not entitled to a joint right in the usufructuary mortgage, Ex P-4, a decree should be passed against the present appellant for half the amount covered by Ex P-9 In the determination of this question, it is difficult, to see how the first respondent had any interest Meyyappa's alternative contention was that if the present appellant was found to have recovered the whole amount under Ex P-9 he (Meyyappa) was entitled to a half share therein and that therefore he should be given a decree for that sum against the present appellant The first respondent had no interest whatever in the determination of this question He was a co-sharer in the amount covered by Ex P-2, the original deed of usufructuary mortgage If

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1 (1875) L R 10 C P 196

2 (1931) 61 M L J 196 L R 58 I A 158 I L R. 53 All 103 (P C)

3 (1932) 63 M L J 64 L R 59 I A 247. I L.R 10 Rang 322 (P C)

it was found that the present appellant had not recovered any amount under Ex P-9, Meyyappa would fail If, on the other hand, he was found to have recovered the whole amount, the plaintiff would be entitled to get half that amount Whether it was the one or the other, it was no concern of the appellant and he was not interested in the determination of that question There was therefore no conflict of interest between the appellant and the first respondent as co-defendants in O. S. No 10 of 1926 We may also mention the ground upheld by the lower Court, and that is this The first respondent and the second respondent, his brother-in-law were both exonerated by Lakshmana Rao, J , and the second appeal No 988 of 1937 was dismissed against the two respondents and thereafter Lakshmana Rao, J , called for a finding whether the present appellant had recovered the amount due under Ex P-2 The finding was returned in favour of Meyyappa and it was accepted by the learned Judge After the second appeal was dismissed against the present respondents, they were no longer parties to the further proceedings which took place in that suit At the time when the decision was rendered that the present appellant had recovered the whole amount under Ex P-9 the present respondents were not parties to the action. On both these grounds we hold that there can be no question of *res judicata* preventing the appellant from proving that in fact he did not receive any amount under Ex P-9

In the result, we allow the appeal and pass a decree for the sum of Rs 8,685-6-5 with further interest at six per cent per annum from the date of the plaint upto the date of realisation against the first respondent The first respondent will pay the appellant his costs here and in the lower Court The second respondent will bear his own costs throughout

K S *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE CHANDRASEKHARA AIYAR

Puliyadi Rajagopala Aiyar . *Appellant**

v.

Karuppiah Pandithan by his authorised agent, Ganapathi Pandithan *Respondent*

Transfer of Property Act (IV of 1882), section 76 (i) as amended in 1929—Redemption decree—Mortgagee to pay mesne profits—Tender of amount—Mortgagee not entitled to deduct amount paid towards taxes after date of tender

Under section 76 (i) of the Transfer of Property Act as amended in 1929 the mortgagee is not entitled to deduct any amount which he had paid towards taxes from the mesne profits ordered to be paid by him to the mortgagor who has tendered the decretal amount under a redemption decree

Subbarao v *Sarvarayudu*, (1922) 44 M L J 534 I L R 47 Mad 7 referred to

Appeal against the order of the Court of the Subordinate Judge, Madura, dated 1st December, 1944, in E P No 116 of 1944, in O S No 47 of 1941

S Ramaswami Aiyangar for Appellant

Respondent not represented.

The Court delivered the following

JUDGMENT —This is an appeal against an order in execution, disallowing to the appellant credit for public taxes, which, he alleges, he paid for the property in respect of which there was a redemption decree The decree provides that the first defendant do pay to the plaintiff mesne profits at Rs 65 per mensem from the date of the plaint, namely, 1st August, 1941 The public charges in the shape of taxes for the house property mortgaged were paid by the first defendant after the amount due under the decree was tendered The Subordinate Judge has held that the first defendant was not entitled to credit for the public charges He referred in this connection to section 76, sub-clause (i) of the Transfer of Property Act

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* A A O No 337 of 1945 13th March, 1946.

It was held in *Subbarao* v *Sarvarayudu*[1], on the interpretation of the language of the sub-clause, as it stood prior to its amendment in 1929, that the position of a mortgagee after the tender could not be regarded as even worse than that of a trespasser and that, as a trespasser would be entitled to deduction out of the mesne profits in respect of payment of taxes, the mortgagee, even though he was to account for the whole of the gross receipts, must be similarly allowed credit for such payments. In *Subbarao* v. *Sarvarayudu*[1], were to govern us, the appellant must succeed. But the view taken in that decision was expressly superseded by the amendment in 1929, as a result of which the word " gross " was omitted before the word " receipts " and the following words were added at the end of the sub-clause, *viz*, " and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property "

There is no warrant for limiting the word " expenses " to what has to be spent in connection with the management and in respect of the collection of rents and profits Clause (*h*) of the section refers to the public charges also as expenses. The object of making the provisions so stringent against the mortgagee is obviously to see that he does not delay the delivery of possession by the adoption of some device or another

There is another difficulty in this case We are not at the stage when the mesne profits are yet to be ascertained They were fixed in the preliminary decree itself at Rs 65 per mensem and we do not know whether public charges were not taken into account when the amount was thus arrived at

The view taken by the Subordinate Judge is right and the appeal is dismissed but without any order as to costs, as the respondent is unrepresented.

V.P.S *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE HORWILL

Devalraju Subbamma *Petitioner**

v

Devalraju Madhavarao and others *Respondents.*

Civil Procedure Code (V of 1908), Order 41, rule 11—Dismissal of appeal in limine—*Application for amendment of decree—To which Court to be made*

An order dismissing an appeal *in limine* under Order 41, rule 11 of the Code of Civil Procedure, has precisely the same effect as an order dismissing an appeal after notice under rule 32 and an application for amendment of the decree must be made to the Court which has dismissed the appeal and not to the lower Court whose decree has thereby been confirmed

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, Kistna, dated 29th December, 1944, in C M P No 135 of 1944 in A S No 184 of 1942

A Raghaviah for Petitioner

B Lakshminarayana for Respondent

The Court delivered the following

JUDGMENT :—The petitioner applied to the lower appellate Court for an amendment of the decree The respondents, however, had filed a second appeal to this Court, which was dismissed *in limine* under Order 41, rule 11 The question that arises is whether the decree to be amended is the decree of this Court in second appeal or the decree of the lower appellate Court. The lower Court dismissed the application for amendment on the ground that the application should have been made in this Court

The learned advocate for the petitioner, while conceding that if notice had issued in second appeal and the second appeal had been disposed of after hearing,

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1 (1922) 44 M L J 534 I L R 47 Mad 7

*C R P No. 763 of 1945 1st March, 1946.

then the amendment application should have been made to this Court, argues that the dismissal of the second appeal *in limine* under Order 41, rule 11 does not amount to a decree It merely dismisses the appeal, it is said, leaving the decree of the lower appellate Court in force In *Muniswami Naidu* v *Muniswami Reddi*[1], it was held that when an appeal was dismissed *in limine* a decree had to be passed by the appellate Court and that decree superseded the decree of the lower Court. It is however argued that the law is now different, because in the old Code, which was in force when *Muniswami Naidu* v *Muniswami Reddi*[1], was decided, the appellate Court was required to confirm the decree in dismissing the appeal The wording of Order 41, rule 11 says nothing about confirming the decree of the lower Court It is argued that on account of this change in procedure, it is no longer necessary to pass a decree after an appeal is dismissed under Order 41, rule 11, and that therefore the proper Court in which to file an application for amendment is the lower Court

Before referring to the one or two cases which have dealt with this question, it may be pointed out that the procedure in this Court has been throughout uniform and was not changed when the present Code of Civil Procedure was drawn up. When an appeal is dismissed under Order 41, rule 11, a decree is drawn up in precisely the same form as when it is dismissed after notice, except that necessarily there is no reference to any advocate appearing for the respondent and no mention of costs Indeed, there is no difference in principle between a dismissal *in limine* and a dismissal after notice, in cases where it is not necessary to call upon the respondent to reply

In *Batuk Prasad Singh* v *Ambica Prasad Singh*[2], it was held that there was a fundamental difference between the law under the old Code and the law under the new Code that made obsolete the earlier decisions of the Madras High Court in *Pichuvayyangar* v *Seshayyangar*[3], and *Muniswami Naidu* v. *Muniswami Reddi*[1] It was pointed out that in Order 41, rule 11, there is no mention of a decree, whereas in rule 32 of the same order it is laid down that the judgment of the appellate Court may be one " for confirming, varying, or reversing the decree " and that in order to confirm the decree it is necessary for the appellate Court to draw up a fresh decree It was also argued then that rule 35, which describes the form that a decree should take could not apply to orders passed under Order 41, rule 11, because some of the provisions of rule 35 would not apply to appeals disposed of *in limine* It seems to me, however, that an order dismissing an appeal is a decree within the meaning of section 2 (2), because it is a formal expression of an adjudication which conclusively determines the rights of parties It seems to me not to make any difference that notice does not go to the respondent; for a notice to respondents will only be necessary if the Court thinks it necessary to hear the respondents in order to determine the questions that arise in the appeal. Even when an appeal is admitted, it is not always that the respondent is called upon to reply, and the fact that it might not be necessary to hear the respondent cannot make the decision any the less a final determination of the rights of the parties It also seems to me that if an appeal is dismissed, that dismissal entails a confirmation of the decree of the lower Court, for that is clearly the effect of it. If an order passed under Order 41, rule 11 is a decree and confirms the decree of the lower Court and rule 35 applies to orders passed under Order 41, rule 11, then it would seem that the decree so passed in appeal would supersede the decree of the lower Court in the same way as if notice had gone to the other side

Although there is great deal to be said for the argument in *Batuk Prasad Singh* v. *Ambica Prasad Singh*[2], yet that authority does not seem to me sufficient to warrant my holding that the procedure consistently adopted by this Court is wrong The above view of the Patna High Court agrees with that held in the Bombay High Court and in Nagpur, but it is not the view of the Calcutta, and other High Courts.

1. (1898) I L R 22 Mad 293
2 (1931) I L R 11 Pat 409
3 (1894) 5 M L J 39 I L R 18 Mad. 214 (F B)

This Court has, I believe, always presumed, even if it has not decided, that an order dismissing an appeal under Order 41, rule 11 has precisely the same effect as an order dismissing an appeal after notice under rule 32

The petition is dismissed with costs.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE LAKSHMANA RAO

A E Subramania Ayyar .. *Appellant**

v.

S S Ramaswami Ayyar and another .. *Respondents*

Madras Civil Rules of Practice, rules 157 *and* 159—*Deposit under rule* 89 *of Order* 21, *Civil Procedure Code—Last day for deposit the reopening day of the Court—Reopening day, a Saturday and a bank holiday—Application and lodgment schedule filed on reopening day—Chalan issued on next working day—Deposit in bank on the same date—If within time—Petitioner, if bound to have applied under rule* 159 *and deposited the amount in Court*

A petitioner under Order 21, rule 89, Civil Procedure Code, had time until 1st July, 1944, in which to make the deposit as required by that rule The Court reopened on 1st July, 1944, which was a bank holiday On the reopening day the Judge of the Court usually sits only for a short time, but does not post any cases for hearing The office of the Court closed at 2 P M, as it was a Saturday The petitioner filed on 1st July, 1944, an application under Order 21, rule 89 and the lodgment schedule for the amount to be deposited But the chalan was not issued until Monday, 3rd July, when the bank reopened On that day the petitioner collected the chalan and paid the money into the bank On a contention that the deposit was then out of time and that the petitioner should have followed the permissive course prescribed by rule 159 of Civil Rules of Practice,

Held, that the petitioner did all that could reasonably be expected of him and that rule 159 of the Civil Rules of Practice was not in the circumstances of the case a bar to the relief asked by him The petitioner was not in a position to make an application under rule 159 which he could have made only if the Judge was present to grant leave to pay the money into Court

Appeal under clause 15 of the Letters Patent against the judgment and order of the Hon'ble Mr Justice Shahab-ud-din, dated 14th September, 1945, and passed in A A O No 494 of 1944, preferred to the High Court against the order of the City Civil Court, Madras, dated 4th September, 1944, and made in E A. No 1099 of 1944 in E P No 743 of 1943 in S C No 6236 of 1942, on the file of the Court of the Small Causes, Madras

T C A Bashyam for Appellant

D Ramaswami Aiyangar, *T S Nagaswami Aiyar* and *K Varadachari* for Respondents

The Judgment of the Court was delivered by

The Chief Justice —This matter was decided against the appellant in the Courts below on a technicality When the facts are fully understood, we are of the opinion that there is no reason why the technicality should prevail and that on the merits the decision should be in favour of the appellant

The first respondent obtained a money-decree against the appellant in the Court of Small Causes, Madras, and in execution proceedings in the City Civil Court attached a house belonging to the appellant The first respondent holds a mortgage over this property as security for a loan of Rs 1,000 granted by him to the appellant The first respondent asked that the property be sold subject to his mortgage It was sold on this condition on the 27th April, 1944, and was bought by the second respondent, who is the paternal uncle of the first respondent. The amount payable under the money decree was Rs 217-12-6.

The City Civil Court closed for the summer vacation on the 1st May, 1944, that is, three days after the sale It reopened on the 1st July, 1944, which was a Saturday and a bank holiday We have ascertained that it is the practice of the

*L P A No 1 of 1946. 15th March, 1946

City Civil Court Judge to sit for a short time on the reopening day, but he does not post any cases for hearing On Saturdays the office of the Court is closed at 2 P.M

The appellant who is the judgment-debtor, had time until the 1st July, 1944, in which to make the deposit required by Order 21, rule 89 of the Code of Civil Procedure when applying under that rule for an order setting aside the sale The appellant decided to take advantage of the rule and on the 1st July, 1944, sought to deposit the decretal amount, plus the 5 per cent solatium The total amount came to Rs 236-7-6

Rule 157 of the Civil Rules of Practice lays down the procedure which a judgment-debtor shall follow in such circumstances The rule reads as follows:

"A person desirous of paying money into Court, hereinafter called the payer, shall bring into Court a lodgment schedule in Form No 57, headed with the cause title of the suit, appeal, or matter, and the particular account therein, if any, to which the money is to be credited, and stating the decree or order, if any, in pursuance of which the payment is made, or the reason for the payment, and the several sums and the total amount to be paid into Court An order for lodgment and counterfoil receipt, in Form No 58, stating the date of issue, and bearing a serial number shall then be filled in, except as to the date of payment and the signature of the receiving officer, by the officer of the Court, and issued to the payer"

At noon on the 1st July, the appellant consulted an advocate and as the result of advice received from him he filed an application under Order 21, rule 89, and the lodgment schedule, but the chalan was not issued until Monday, the 3rd July, when the bank reopened On that day he collected the chalan and paid the money into the bank It is said that he was then out of time because he should have followed the permissive course prescribed by rule 159 and did not. That rule is in these terms

"If the bank or the treasury is closed, the money may, with the leave of the Judge, be paid to the officer of the Court, in such case the lodgment schedule shall be endorsed with a receipt to be signed by the Judge, and the amount shall, on the next day on which the bank or treasury is open, be sent, together with an order and counterfoil receipt, by the officer of the Court to the bank or treasury officer, who shall return the said receipt to the Court"

The City Civil Judge held that it was obligatory on the part of the appellant to have acted in accordance with this rule and consequently he dismissed the application for an order setting the sale. In the course of his judgment the learned City Civil Judge said that there was considerable force in the contention raised by the respondents that on the 1st July, the appellant had not the Rs. 236-7-6 available. This observation is not supported by any evidence As the money was paid as soon as the bank reopened on the Monday, the only reasonable conclusion was that the appellant had the money on the Saturday It is very unlikely that he would have filed the application and brought into Court the lodgment schedule if he had not the necessary funds available. On the other hand, the appellant has stated in evidence that he had Rs. 250 in his possession That evidence should certainly have been accepted. The City Civil Court Judge did not, however, base his decision on the respondent's contention in this connection He dismissed the appellant's application solely on the ground that rule 159 had not been complied with He expressed the opinion that the appellant could have paid the money to an officer of the Court entitled to receive it The money could only have been paid into Court with the leave of the Judge himself

The appellant appealed to this Court against the order dismissing his application The appeal was heard by Shahab-ud-din, J, who agreed with the City Civil Court Judge that it was incumbent upon the appellant in the circumstances to have applied under rule 159 for leave to pay the money into Court on the 1st July as it could not be paid into the bank on that day.

We are certainly not satisfied that the appellant was in a position to make an application under rule 159 The indications are that he was not He has sworn to an affidavit to the effect that the Judge rose at 1 P M, and we accept the statement, which is in accordance with the probabilities. In his order dismissing the appellant's application the Judge has not said that he was there to deal with an application under rule 159 when the appellant brought to the office the application

under Order 21, rule 89, and the lodgment schedule If the Judge was not then present, it was impossible for the appellant to take advantage of rule 159. Mr. D. Ramaswami Aiyangar on behalf of the first respondent has very properly conceded that, if the Judge was not there to grant leave to pay the money into Court, the appellant was entitled to ignore rule 159, and under such circumstances the payment of the money into the bank on the Monday would be within time.

We consider that the appellant did all that could reasonably be expected of him and that rule 159 is not in the circumstances of the case a bar to the relief asked for by him.

We allow the appeal with costs here and in the Courts below

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE KUPPUSWAMI AYYAR.

Nimmagadda Ramaseshayya .. *Petitioner* *

Official Acts—Presumption—Official notification—Infringement of—Presumption of publication in the manner prescribed—Same person giving direction for publication and actually signing it—No need for further evidence to prove the correctness of official act

Where in a case the prosecution has not let in evidence to prove that the order infringed has been published in the manner in which the officer who passed the order had directed it to be published,

Held, that because the person who is said to have directed the notification to be published and the person who signed the notification which was actually published in the official Gazette happened to be the same person, the Court was justified without any further evidence in acting on the presumption that it was directed to be published in the manner in which it was published

Public Prosecutor v *Narayana Reddi*, (1945) 1 M L J 273, *Emperor* v *Krishna Chandra*, I L R. (1945) All 682 and *Leslie Gwilt* v *Emperor*, A I R 1945 Bom 368, distinguished

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Ellore, dated 24th August, 1945, in C A No 23 of 1945, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Ellore, dated 16th June, 1945, in C C No 1603 of 1944

N V B Sankara Rao for Petitioner

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown

The Court made the following

ORDER —The only point urged before me is that in this case the prosecution has not let in evidence to prove that the order infringed had been published in the manner in which the officer who passed the order had directed it to be published and consequently the prosecution must fail Reliance was placed for this on the decision of this Court in *Public Prosecutor* v *Narayana Reddi*[1] In this case evidence has been let in as to how the notification has been published It has been published in the Fort St George Gazette, dated 8th June, 1943, and the notification is signed by the Commissioner of Civil Supplies The person who is said to have directed the notification to be published is also the same person. The person who has prescribed the manner in which the notification has to be published has himself signed the notification wich is published in the Fort St. George Gazette The manner of publication must hence be presumed to be in the manner in which it was published in the Fort St George Gazette In this case it has not been suggested in the cross-examination of the Tahsildar that the officer who passed the order directed it to be published in any different manner There is also the usual presumption of official acts, that official act has been done properly The lower Court was justified without any further evidence in acting on the presumption that it was directed to be published in the manner in which it was published This aspect of the case has not been considered by my learned brother in *Public Prosecutor*

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* Cr R C No. 1024 of 1945. 26th March, 1946.
(Cr R. P. No. 958 of 1945.)

1. (1945) 1 M.L J. 273.

v *Narayana Reddi*[1]. My attention has also been drawn to one ruling of the Allahabad High Court in *Emperor* v. *Krishna Chandra*[2] and to the decision in *Leslie Guilt* v. *Emperor*[3]. There is nothing to indicate that in any of those cases there was any notification published which was proved or that the notification was signed by the same officer who has directed the manner in which it was to be published In these circumstances, I do not think those two rulings have any application to the facts of the present case

In the result this petition fails and is dismissed

K C *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Mokshagundam Nagabhushanayya and others .. *Appellants**

v.

Pasam Kotayya and others .. *Respondents.*

Limitation Act (IX of 1908), *Article* 47—*Order under sub-section* (6) *of section* 145, *Criminal Procedure Code—Revision to High Court—Order dismissing* in limine—*Order of the Magistrate the final order within the meaning of Article* 47 *of the Limitation Act and not that of the High Court.*

Where an order of a Magistrate passed under section 145 (6) of the Criminal Procedure Code is not modified by the High Court in revision, it is the final order within the meaning of Article 47 of the Limitation Act If the application for revision is accepted, and the Magistrate's order is set aside, then his order is no longer the final order , but until it is set aside or modified, it is Hence when a revision against an order of a Magistrate passed under sub-section (6) of section 145 is dismissed by the High Court *in limine* it is the order of the Magistrate and not that of the High Court that is the final order within the meaning of Article 47 of the Limitation Act.

Appeal against the judgment and decree of Happell, J , dated 12th July, 1945, in S A No 2072 of 1944, preferred against the decree of the Court of the Subordinate Judge, Kurnool, in A S No 16 of 1944, preferred against the decree of the Court of the District Munsiff, Markapur, in O S No 229 of 1942

K Kotayya for Appellants.

K Subbarao, *P Ram Reddi* and *K Ramamurthi* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice—This appeal raises an interesting question of law. We consider that the correct opinion was expressed in the judgment under appeal.

The plaintiff and defendants 1 to 5 were the owners of a parcel of agricultural land measuring 2 30 acres In 1939 there were proceedings under section 145 of the Code of Criminal Procedure As the result of the inquiry the Magistrate held that the sixth defendant was in possession, and passed an order under sub-section (6) of the section The order, which is dated the 16th January, 1939, was passed against defendants 1 to 5 alone The plaintiff was not a party to the proceedings under section 145 Defendants 1 to 5 filed an application in this Court, asking for revision of the Magistrate's order This application was rejected *in limine* by an order dated the 15th August, 1939 The suit out of which the appeal arises was filed on the 26th May, 1942 The plaintiff asked that possession be given to him and to his co-owners Article 47 of the Limitation Act provides that a suit of this nature shall be brought within three years of the date of the final order in the case It can only be brought by a person bound by the order The plaintiff was not bound by the order and he had the right to sue without regard to Article 47 ; but if the final order within the meaning of the Article is that passed by the Magistrate on the 16th January, 1939, the suit was out of time so far as defendants 1 to 5 were concerned On the other hand, if limitation runs from the date of the dismissal of the application for revision, the whole suit was in time The District Munsiff

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1. (1945) 1 M L J 273
2. I L R. (1945) All 682.
3. A I R. 1945 Bom 368

*L P A No 70 of 1945 12th March, 1946.

held that so far as defendants 1 to 5 were concerned the suit was out of time and therefore merely gave a decree to the plaintiff for his share of the property The decree passed by the District Munsiff was confirmed by the Subordinate Judge and by Happell, J, on second appeal The present appeal is by defendants 1 to 5 from the judgment of the learned Judge

The District Munsiff and Happell, J, relied on the following observations of Sadasiva Aiyar, J, sitting with Napier, J, in *Venugopala Mudali* v *Venkatasubbiah Chetty*[1].

> "I need not say that where the order on a review petition as distinguished from an appeal petition merely refuses to interfere with the judgment or order sought to be reviewed or where an appeal is not entertained at all, though filed, the original decree or order is and continues to be the subsisting and final decree or order In this respect an order rejecting a review petition stands on a different footing from a decision passed on appeal confirming the lower Court's judgment and dismissing the appeal If the decision on review or revision does interfere with the original decision, the former decision becomes the only subsisting order and stands on the same footing as the decision passed in a competent appeal It will in that case become the starting point for limitation"

It is true that these observations were in the nature of *obiter dicta*; but for reasons which we shall presently state, we agree with them

The learned Advocate for the appellants contends that an application for revision must be placed on the same footing as an appeal which is summarily dismissed under the provisions of Order 41, rule 11 of the Code of Civil Procedure The decree which gives the starting point for limitation is the decree of the appellate Court which in effect embodies the decree of the trial Court In this connection the judgment of a Full Bench of this Court in *Chidambara Nadar* v *Rama Nadar*[2] and the judgments of the Privy Council in *Raja of Ramnad* v *Kamid Rowthen*[3] and *Nagendranath De* v *Sureshchandra De*[4] have been cited

In *Chidambara Nadar* v. *Rama Nadar*[2] this Court held that the term "appeal" in Article 182 (2) is not used in a restrictive sense so as to exclude revision petitions and the expression "the appellate Court" in this article is not confined to a Court exercising appellate, as opposed to, revisional powers In arriving at this decision the Court had regard to what the Judicial Committee had said in *Raja of Ramnad* v *Kamid Rowthen*[3] and *Nagendranath De* v *Sureshchandra De*[4]. In the former of these two cases Lord Dunedin in delivering the judgment of the Board, observed.

> "From this judgment an appeal in the form appropriate to such a case from the Munsiff's Court, *i.e*, civil revision petition, was preferred to the High Court of Madras"

In *Nagendranath De* v *Sureshchandra De*[4], in delivering the judgment of their Lordships Sir Dinshah Mulla said

> "There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent The 1920 appeal was admitted and was heard in due course and a decree was made upon it."

These judgments do warrant the assertion that there is an analogy between a revision petition and an appeal, but it does not follow that an order dismissing *in limine* an application for revision of an order passed under section 145 (6) of the Code of Criminal Procedure is a final order within the meaning of Article 47 of the Limitation Act Before the deletion of sub-section (3) of section 435 in 1923, the High Court had no power under the Code of Criminal Procedure to hear an application for revision of an order passed under section 145 As the result of the deletion of that sub-section an application for revision does lie under the Code, but the application is still governed by sections 435 to 440 of the Code of Criminal Procedure. Section 440 expressly states that no party has any right to be heard, either personally or by pleader, before any Court when exercising its powers of revision Therefore, when a petition for revision is presented, it is open to the Judge before whom it comes to read it through and, if he thinks fit, he can dismiss it without hearing any one In the present case the advocate who presented the petition was heard, but

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1. (1915) I L R 39 Mad 1196 I L R 49 Mad 335 (P C.).
2. (1937) 1 M L J 453 I L R (1937) Mad. 616 (F B)
3. (1926) 50 M L J 503 L R. 53 I A. 74.
4. (1932) 63 M.L J 329. L R 59 I A 283: I.L R. 60 Cal 1 (P C).

this makes no difference to the effect of the order of dismissal. The application was dismissed because on the face of the petition there was no scope for the exercise of the Court's revisional powers, which means that the order of the Magistrate stood entirely untouched

We are unable to accept the suggestion that in such a case as the present, there is an analogy between a revision petition and an appeal The order dismissing an application of this nature does not mean the substitution of the order of the High Court for the order of the Magistrate and therefore it cannot be said to incorporate his order. The real analogy is when the Court dismisses an application for review When it does so, the decree sought to be reviewed stands and an appeal, if one lies, is from the decree, not from the order refusing to review

There is another factor Section 145 of the Code of Criminal Procedure contemplates two orders, a preliminary order under sub-section (1) and a final order under sub-section (6). Article 47 of the Limitation Act applies to the second order. Of course, if the application for revision is accepted and the Magistrate's order is set aside, his order is no longer the final order ; but until it is set aside or modified, it is

We hold that where an order of a Magistrate passed under section 145 (6) of the Code of Criminal Procedure is not modified by the High Court in revision, it is the final order within the meaning of Article 47 of the Limitation Act.

The appeal fails and must be dismissed with costs in favour of the sixth defendant.

V S *Appeal dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR JUSTICE LAKSHMANA RAO AND MR JUSTICE KUNHI RAMAN

Narayanan Nambudripad .. *Appellant**

v.

Beepattumma .. *Respondent.*

Landlord and tenant—Suit to enforce payment of rent payable in kind—Landlord, if entitled to demand market price of paddy as on the date of suit—Price ruling on date when paddy should have been delivered must be accepted

Where the landlord is suing to enforce the payment of rent in a case where rent is payable in kind, he must accept the price ruling on the date when the paddy should have been delivered to him and is not entitled to demand at the market price of paddy ruling on the date of the institution of the suit

Appeals under clause 15 of the Letters Patent against the judgment and decree of Chandrasekhara Aiyar, J., dated 7th May, 1945, in S A Nos. 1376 and 1389 of 1944 and A A A O No 241 of 1944 preferred against the decree and order of the Court of the Subordinate Judge, South Malabar, at Palghat, in A S No 176, etc., of 1943 respectively preferred against the decree of the Court of the District Munsiff, Palghat, in O S. No 170 of 1943, etc

P Govinda Menon and *T. C Raghavan* for Appellant

C K. Viswanatha Aiyar for Respondent

The Judgment of the Court was delivered by

The Chief Justice —These three appeals, filed under clause 15 of the Letters Patent, all raise the same question, namely, whether in a case where rent is payable in kind and the landlord is suing to enforce payment he is entitled to take the market price ruling on the date of the institution of the suit or whether he must accept the price ruling on the date when the produce should have been delivered to him.

Under the leases in suit the rents were payable in terms of paddy and were to be delivered at the granary of the landlord on the due date The District Munsiff held that the landlord was entitled to the market price ruling on the dates when proceedings were instituted. On appeal by the tenants the Subordinate Judge held that the prices to be taken were those ruling when the rents fell due ;

*L P As Nos 67, 68 and 69 of 1945. 11th March, 1946

and with this view Chandrasekhara Aiyar, J, in second appeal agreed These appeals are from his judgment The appeals have been heard together and can be dealt with in one judgment

There are numerous decisions of Judges of this Court sitting alone which support the judgment of Chandrasekhara Aiyar, J, but there is a Bench decision which apparently runs to the contrary In none of the cases has the question of law now under discussion been really discussed

The first decision given was in *Parameswaran Nambudripad* alias *Narayanan Thrathar Nambudripaa* v *Subramania Aiyar*[1], which was a second appeal heard by Horwill, J The main question there was whether section 51 (2) of the Malabar Tenancy Act applied where the rent was payable in kind It was held that it did not apply It is accepted by both sides here that the decision on this question is correct The learned Judge went on to state that where rent has to be paid in kind at a particular place and the tenant does not deliver the paddy, the landlord is entitled to its value according to the market price at the time of " the breach". The learned Judge gave a decision to the same effect in *Achutan Nayar* v *Madhavan Nayar*[2] and again in the unreported case of *Ammalu Amma* v. *Kandan Narayanan Nambudripad*[3] The same view was taken by Somayya, J, in *P P V Kunhiraman* v *K T V Kunhiraman*[4] and in the unreported case of *Kanthaswami Pillai* v. *Narayanan Nambudripad*[5] In *Meghji Gopalji Sait* v *A S Kalyani Ammal*[6] also unreported, Bell, J, agreed The learned Judge whose judgment is now under appeal had expressed the same opinion in *Kunhachumma* v *Manavedan* alias *Valia Thirumalpad*[7].

The case decided by the Division Bench is *Chandukutti Nambiar* v *Kalhar Kutty*[8], which was heard by Wadsworth and Patanjali Sastri, JJ There the question was whether the Courts below were right in fixing the commutation rate with reference to the terms of section 51 (2) of the Malabar Tenancy Act or whether the plaintiffs were entitled to a decree based on the market price of the produce ruling on the date of the plaint The learned Judges accepted the view taken in the earlier cases on the question of the applicability of section 51 (2) and therefore decided that the plaintiffs were entitled to convert the rent at the market price prevailing on the date of the suit Apparently there was no argument on the question whether the proper rate was that prevailing on the date fixed for the payment of the rent

It would appear that Somayya and Horwill JJ, accepted the market price ruling on the date when the rent should have been paid on the ground that there was a breach of contract by the tenant and therefore it was a matter of assessing damages With great respect, we do not consider that this is a correct aspect. The question is what is the landlord entitled to in money in lieu of the paddy which should have been delivered to him at the end of the year of tenancy. Obviously, the landlord cannot maintain a suit for specific performance, he cannot ask the Court to direct that the tenant shall deliver to him so many measures of paddy When the tenant failed to deliver the required amount of paddy on the due date, the landlord had the right of suing for the recovery of its value as on that date and that is all he is entitled to He cannot improve his position by sitting on his rights In these cases the landlord wishes to have the rate ruling at the date of plaint because the market price of paddy has greatly increased in the meantime. We can well imagine that if the price had fallen, a claim for the market price ruling on the date due for payment of the rent would have been urged with much stronger emphasis

We hold that the landlord is not entitled to recover anything more than the value of the paddy at the rate ruling when the paddy should have been delivered to him.

It follows that these appeals must be dismissed with costs but confined to the costs in L P A No 68 of 1945

V S ——— *Appeals dismissed.*

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1 (1944) 2 M L J 84
2 (1945) 2 M L J 13
3 S A Nos 941 and 942 of 1944.
4. (1945) 1 M L J 336
5 S A No 683 of 1944
6 A A A O No 302 of 1944
7 S A No. 1611 of 1944.
8 (1945) 2 M L J 351

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO

Andal Vaidyanathan ... *Appellant**

v

Abdul Allam Vaidya ... *Respondent.*

Special Marriage Act (III of 1872), sections 16 and 17—Marriage of a Hindu Brahmin with a Hindu non-Brahmin lady under the Act—Husband becoming a Mahomedan—Wife called upon to embrace Mahomedan faith—Refusal—Suit to declare marriage dissolved—Maintainability—Proper remedy

If two persons were married under the Special Marriage Act and one of them becomes converted to Islam, the marriage could only be dissolved under the provisions of the Indian Divorce Act

A Hindu Brahmin married a Hindu non-Brahmin lady under the Special Marriage Act on the 13th May, 1934 In May 1944, the husband became a Mahomedan and called upon his wife to embrace the Mahomedan faith On her refusal, he filed a suit for a declaration that the marriage between him and the defendant had become dissolved On a question as to the maintainability of such a suit,

Held, that the Special Marriage Act only contemplates monogamy and a person married under the Act cannot escape from its provisions by merely changing his religion The provisions of section 16 of the Act makes this clear beyond all doubt and section 17 provides the only means for the dissolution of a marriage or a declaration of its nullity The marriage was not a marriage in the Mahomedan sense which could be dissolved in the Mahomedan manner. It is a statutory marriage and can only be dissolved in accordance with the statute

Appeal against the decree of the Court of the City Civil Judge, Madras, in O. S No 416 of 1944

S G Rangaramanujam and *M Balachandrudu* for Appellant

The Advocate-General (*K Rajah Aiyar*) *amicus curiae.*

The Judgment of the Court was delivered by

The Chief Justice —The appellant who is a Hindu non-Brahmin was married under the Special Marriage Act (Act III of 1872) on the 13th May, 1934, to the respondent who was then a Hindu Brahmin A daughter was born to the parties some two years later In the month of May 1944, the respondent became a Mahomedan and called upon his wife to embrace the Mahomedan faith She refused to do so and consequently the respondent filed a suit in the City Civil Court for a declaration that the marriage between him and the appellant had become dissolved The principal Judge of the City Civil Court tried the case and came to the conclusion that the provisions of the Special Marriage Act did not preclude the operation of the personal law of a Mahomedan and therefore, as the appellant had refused to embrace her husband's religion, the marriage must be deemed to have been dissolved The defendant has appealed

We have no hesitation in stating that the learned Principal Judge misconstrued the relevant provisions of the Special Marriage Act When these are understood it is abundantly clear that the marriage between the appellant and the respondent could only be dissolved under the provisions of the Indian Divorce Act, 1869

The conditions required by section 2 of the Special Marriage Act were fulfilled in this case and the marriage was solemnised before the Registrar in accordance with section 11 of the Act Section 17 states that the Indian Divorce Act shall apply to all marriages contracted under the Special Marriage Act and any such marriage may be declared null or dissolved in the manner therein provided and for the causes therein mentioned The section also provides that it may be declared null on the ground that the marriage contravenes one or more of the conditions prescribed in clauses (1), (2), (3) or (4) of section 2 of the Special Marriage Act But beyond this it does not go As we have already indicated, there was no contravention of section 2

Section 16 of the Special Marriage Act provides that a person married under it, who, during the lifetime of his or her wife or husband, contracts another marriage,

* C C C A No 49 of 1945 5th March, 1946

shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife, whatever may be the religion which he or she professed at the time of the second marriage Therefore a person married under the Special Marriage Act commits bigamy if he marries again during the lifetime of his spouse, and it matters not what religion he professes at the time of the second marriage

Sections 22, 23, 24, 25 and 26 indicate further great changes in the personal law of a party to a marriage under this statute. Section 22 says that such a marriage of a member of an undivided family who professes the Hindu, Bhuddhist, Sikh or Jaina religion shall be deemed to effect his severance from his family Section 23 says that such a person shall have the same rights and be subject to the same disabilities in regard to right of succession to property as a person to whom the Caste Disabilities Removal Act, 1850, applies. Section 24 states that succession to the property of a person professing one of these religions who marries under the Act and to the property of the issue of such marriage shall be regulated by the provisions of the Indian Succession Act, 1865 Section 25 takes away the power of adoption. Section 26 gives the father of a man married under the Act the right to adopt a son under the law to which he is subject, if he has no other son living

The Special Marriage Act clearly only contemplates monogamy and a person married under the Act cannot escape from its provisions by merely changing his religion The provisions of section 16 makes this clear beyond all doubt and section 17 provides the only means for the dissolution of a marriage or a declaration of its nullity

The Principal Judge based his decision on the judgments in *Muncherji Cursetji Khambhatta* v *Jessie Grant Khambatta*[1], and In the matter of *Ramkumari*[2] In neither case was the marriage under the Special Marriage Act and the judgments have no bearing whatever on the question now before the Court The question was considered by the Calcutta High Court in *Noor Jehan* v *Eugene Tiscenko*[3] It was there said that there could be no doubt that if two persons who were married under the Special Marriage Act subsequently became converted to Islam, the marriage could only be dissolved under the provisions of the Indian Divorce Act, and it follows from what we have said that we respectfully agree The same would apply even if only one of them became converted to Islam To use the language of Swinfen Eady, L J, in *Rex* v *Hammersmith Superintendent Registrar of Marriages Mir Anwaruddin* Ex parte[4], this marriage is not a marriage in the Mahomedan sense which can be dissolved in the Mahomedan manner We may add that it is a statutory marriage and can only be dissolved in accordance with the statute

For these reasons we allow the appeal and dismiss the suit with costs both here and below

We are indebted to the learned Advocate-General, who has appeared as *amicus curiae*, for his great assistance to the Court

V S *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE HORWILL AND MR JUSTICE KOMAN.

A. Sreenivasa Chariar .. *Appellant**

v

T N Seshadri Iyengar *Respondent.*

Indian Soldiers (Litigation) Act (IV of 1925), sections 6 and 10—Scope of—Soldier being junior member of joint Hindu family managed by elder brother—Sale of family property in execution of mortgage decree—Grounds for setting aside

In execution of a mortgage decree the family property of a joint Hindu family of two brothers, the younger of whom was in the army and gone overseas, was sold in spite of attempts on the

1 (1934) I L R 59 Bom 278
2. (1891) I L R 18 Cal 264
3 (1941) 45 C W N 1047
4. (1917) 1 K B 634 at 659

*A A O No 684 of 1944 9th January, 1946.

part of the latter to have the proceedings stayed. On an application by him to have the sale set aside,

Held, that while section 6 of the Indian Soldiers (Litigation) Act permits the Court to refrain from suspending the proceedings if the interests of the soldier are identical with those of any other party and adequately represented by such party, section 10 empowers a Court to set aside a sale if it is of opinion that it is in the interests of justice to do so As in the circumstances of the case, the elder brother as manager of the Joint Hindu family had adequately represented the applicant in the execution proceedings, the interests of justice did not require that the sale should be set aside

Appeal against the order of the Court of the Subordinate Judge, Chingleput, dated 13th July, 1944, in E A No 62 of 1944 in O S. No 89 of 1940

C Narasimhachari and *M E Rajagopalachari* for Appellant.

K Krishnaswami Aiyangar and *N C. Raghavachari* for Respondent

The Judgment of the Court was delivered by

Horwill, J—The respondents' predecessor-in-title obtained a mortgage decree against the appellant and his elder brother, Anantachari, these two being members of a joint family of which Anantachari was the manager. During the course of execution, the appellant, who was in the army and went as a clerk overseas in March 1942, sent in petitions from time to time through his Commanding Officer asking the Court to stay execution as his presence was essential for the proper disposal of the petition. Later on, after the sale was confirmed, he put in an application to set aside the sale, which was dismissed , and it is against that order of dismissal that the present appeal has been preferred.

The question is whether, in view of sections 6 and 10 of the Indian Soldiers (Litigation) Act of 1925, the lower Courts should have set aside the sale Section 6 says that the Court shall suspend the proceedings unless the interests of the soldier in the proceedinge are in the opinion of the Court either identical with those of any other party in the proceeding or adequately represented by such party Section 10 says that if the Court is satisfied that the interests of justice require that the decree or order should be set aside as against the soldier, the Court shall make an order accordingly Section 10 therefore empowers a Court to set aside a sale if it is of opinion that it is necessary in the interests of justice to do so Section 6 permits the Court to refrain from suspending the proceedings if the interests of the soldier are identical with those of any other party and adequately represented by such party

Since Anantachari, the elder brother of the appellant, was the manager of the family he was clearly the proper person to oppose, if necessary, the execution of the decree against the family property So that unless the appellant was able to show that despite the fact that his brother was the manager of the family, he did not adequately represent him or had done some act to prejudice him, he could not succeed in the application made by him in the lower Court. The only act of Anantachari to which the learned advocate for the appellant could point to as being prejudicial to his interests and thereby disentitled Anantachari to adequately represent him is the transaction, Ex. P-4, under which the decree-holder promised to reconvey a portion of the property sold if the sum of Rs. 4,500 was paid within two years and six months of the date of the confirmation of the sale It is argued that by this document Anantachari sought to secure an interest personally to himself and adverse to the appellant, in that the land was to have been conveyed to him alone and not to the two brothers P. W 2, who described himself as the agent of the first defendant alone, deposed that it was not Anantachari's intention to repurchase the property for the family ; but the evidence of this witness has to be examined with caution, as it is not at all improbable that he is working as much in interests of the appellant as in the interests of Anantachari There is no reason to believe that Anantachari intended to secure this land for himself In fact, he was unable to repurchase the land, because he could not raise the sum of money required. There is no reason to think that even if the appellant had been present in Chingelput during the course of execution of the decree, he could have done anything which Anantachari did not do equally well for him.

It has been pointed out that on 15th July, 1943, the decree-holder sold for Rs. 11,500 the property which he had purchased in execution of the decree for Rs 6,500, which, it is said, is evidence of the inadequacy of the price paid and possibly an indication of some fraud It has however to be remembered that a purchaser in Court auction is not often willing to pay the market price, as he knows that he may have to indulge in further litigation, and that during the years that elapsed between the sale, and the re-sale prices of lands were rising very steeply

We therefore agree with the learned Subordinate Judge that the interests of justice did not require that the sale of the land should be set aside. The appeal is dismissed with costs.

V S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE KUPPUSWAMI AYYAR.

Patchamatla Chinna Sathiraju .. *Petitioner**

Defence of India Rules, (1939) *rules* 56 (4) *and* 121—*Notification of District Magistrate prohibiting processions, meetings and flag salutations—Mere taking of a flag, and standing in the street, when there is no procession or meeting—Not an act in defiance of the notification.*

The notification issued by a District Magistrate under rule 56 of the Defence of India Rules, prohibited the holding of public processions, meetings or flag salutations in connection with the Indian Independence Day celebration Where all that was found was that the petitioner took a flag and stood in the street and that there was no meeting, no proceession and no flag salutation, it cannot be said that the petitioner's act amounted to any of the acts prohibited by the notification and hence his conviction for an offence under rule 56 (4) read with rule 121 of the Defence of India Rules cannot be upheld

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of West Godavari division at Ellore dated 16th July, 1945, in C A. No. 24 of 1945, (C C No 11 of 1945, Sub-Divisional Magistrate's Court, Bhimavaram).

P Satyanarayana Raju for Petitioner.

The Public Prosecutor (*V L Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER —The petitioner was convicted by the Sub-Divisional Magistrate of Bhimavaram of an offence punishable under rule 56 (4) read with rule 121 of the Defence of India Rules for having acted in defiance of an order passed by the District Magistrate of West Godavari under rule 56 of the said rules. He was sentenced to one year's rigorous imprisonment. On appeal the sentence was reduced to six months' simple imprisonment.

The charge runs thus

"That you, on or about the 26th dav of January, 1945, at Chinanindrakolanu village, in defiance of the order, dated 18th January, 1945, of the District Magistrate, West Godavari, passed under rule 56 of the Defence of India Rules, prohibiting the celebration of the Indian "Independence Day" by conducting "flag salutation" etc attempted to conduct a flag salutation by planting a tri-coloured Congress flag in a public street near Ramalayam and thereby committed an offence punishable under rule 56 (4) read with rule 121 of the Defence of India Rules."

All that has been found by the lower Courts was that the petitioner took a flag and stood in the street and that there was no meeting, no processsion and no flag salutation That is what the learned Sessions Judge in appeal definitely finds. The notification issued by the District Magistrate of West Godavari runs thus

"In exercise of the powers delegated to him under rule 56 of the Defence of India Rules, the District Magistrate, West Godavari for the purpose of securing the public safety, the maintenance of public order and the efficient prosecution of War, hereby prohibits the holding of or taking part in public processions, meetings or assemblies for or connected with the celebration of the Indian "Independence Day" or the propagation of the "Independence Pledge" or for conducting any "flag salutation" in this connection, within the local limits of the West Godavari District"

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* Cr R C No 629 of 1945 20th December, 1945.
(Cr. R P No. 587 of 1945).

It will be seen that what was prohibited was (1) the holding of or taking part in public processions, (2) meetings, (3) assemblies for or connected with the celebration of the Indian Independence Day or the propagation of the Independence Pledge, (4) or for conducting any flag salutation in this connection. In the charge the only thing mentioned is flag salutation and it is also stated that there was an attempt to conduct flag salutation. From the finding of the Sessions Judge it is clear that there was no flag salutation. He also says that there was no procession or meeting. So I am not able to see how the petitioner disobeyed the order of the District Magistrate Merely holding a flag or standing in the street with a flag which is what the petitioner is said to have done, cannot be said to amount to any of the acts which are prohibited by the order of the District Magistrate

I accordingly set aside the conviction and sentence and acquit the petitioner

V P.S *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT.—MR. JUSTICE KUPPUSWAMI AYYAR.

Palaniswami Goundan *Petitioner*.*

Criminal Procedure Code (V of 1898), section 173—Laying of supplementary or further charge sheets—Powers of the investigating officer

On the question whether a police officer, who filed a "final charge sheet" in which he had not laid a charge against one of several persons against whom information had been received by him at the earliest stage of investigation, could file a further charge sheet against that person without disclosing that he had received any further information,

Held, that all that the section says is that the "final charge sheet" shall be filed after the investigation is closed, but there is nothing said in the Code as to when the investigation is to be considered to have ended If a police officer after he lays a charge, gets information he can still investigate and lay further charge sheets

Petition praying that in the circumstances stated therein, the High Court will be pleased to quash the proceedings in C C No 172 of 1945, on the file of the Court of the Additional First Class Magistrate, Erode

K S Jayarama Aiyar and *C. K Venkataranarasimham* for Petitioner.

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown

The Court made the following

ORDER —The only point for consideration in this case is whether a police officer, who had filed what is styled as a "final charge sheet" in which he has not laid a charge against one of several persons against whom information was received by him at the earliest stage of investigation, could file a further charge sheet against that person without disclosing that he had received any further information. No authority has been cited for the contention that such supplementary charge sheet cannot be laid All that the section says is that the final charge sheet shall be filed after the investigation is closed, but there is nothing said in the Code as to when the investigation is to be considered to have ended If a police officer after he lays a charge, gets information, he can still investigate and lay further charge sheets, and so there is no finality either to the investigation or to the laying of charge sheets in the sense in which it is sought to be understood in this case I therefore do not think I will be justified in quashing proceedings. The petition is accordingly dismissed.

K C. *Petition dismissed.*

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* Crl. M. P. No. 1300 of 1945. 18th January, 1946.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR JUSTICE LAKSHMANA RAO

Penta Govindu and another .. *Appellant**

v

Medida Venkatapathi and others .. *Respondents.*

Hindu Law—Widow—Alienation—Necessity—Onus—Lapse of time obliterating evidence—Effect—Inference as to necessity—Permissibility—Existence of suspicious circumstances—Effect

Where owing to the lapse of time it is impossible to produce evidence of necessity in support of an alienation by a Hindu widow or evidence of inquiry by the alienee and there is no ground for suspecting abuse by the widow of her power to alienate for a necessary purpose, the Court can disregard the ordinary rule of Hindu Law as to onus of proof and draw an inference in favour of the validity of the alienation But where a reasonable doubt does exist the Court should refuse to draw the presumption The fact that a widow sold valuable lands for a small sum to one of her brothers who later shared them with another brother gives reason for suspecting that her intention was to benefit the members of her own family In such circumstances, it would not be equitable to draw a presumption in favour of the validity of such a sale

Case-law reviewed

Appeal against the decree of the Court of the Subordinate Judge of Coconada in A S No 98 of 1943, presented against the decree of the Court of the District Munsiff, Peddapuram, in O S No 225 of 1938

P Somasundaram and *P Suryanarayana* for Appellant

K Umamaheswaram and *P Kameswara Rao* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice—This appeal relates to the succession to the estate of one Penta Kondayya, who died about the year 1880 He was survived by his wife Paddamma *alias* Papamma, who lived until the 1st September, 1926. The first appellant avers that he is the reversioner to the estate and has assigned to the second appellant a half share of the reversionary rights claimed by him On the 23rd August, 1938, the appellants filed in the Court of the District Munsiff of Peddapuram, the present suit for possession of Kondayya's estate, which according to them consists of 30 83 acres of dry land in Peddapuram and 5 94 acres of wet land in Kattamuru. The first plaintiff's son was in possession of 20 acres of the dry lands and he was made the first defendant in the suit. The rest of the dry lands were in the possession of defendants 2 to 4 On the 25th April, 1883, the widow sold to her brother M Kondayya, all the wet lands for a sum of Rs. 100. On the 15th May, 1891, M Kondayya conveyed by deed of gift a half of the wet lands to his brother, Polayya. M Kondayya and Polayya are dead M Kondayya is represented by his sons the fifth and sixth defendants and Polayya by his sons and grandson, his sons being the second and third defendants and his grandson the fourth defendant

The District Munsiff dismissed the suit. He held that it had not been established that the first plaintiff was the nearest reversioner to the estate and that it had not been proved that the lands in suit had belonged to Kondayya. The plaintiffs appealed to the Subordinate Judge of Coconada who reversed both these findings He granted a decree for possession of the dry lands but refused relief in respect of the wet lands as he considered that there was nothing to show under what circumstances the widow had conveyed these lands to her brother, M Kondayya and that it was to be presumed that the alienation was for a necessary purpose.

The plaintiffs have appealed against the dismissal of their claim for possession of the wet lands Defendants 2 to 4 have filed a memorandum of cross-objections in which they say that the Subordinate Judge erred in holding that the first plaintiff was the nearest reversioner to Kondayya's estate and that Kondayya died possessed of the dry lands in suit This being a second appeal, the findings of the Subordinate

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* S A No. 1229 of 1945. 21st February, 1946.

Judge on questions of fact are binding on us, provided, of course, that there is evidence to support them, which is the case here

[Their Lordships after discussing the evidence proceeded]

We agree with the Subordinate Judge that when the documents exhibited in the case are considered in conjunction with the statement in the will the only reasonable conclusion is that Kondayya died possessed of all the properties described in the plaint

We have now to decide whether the Subordinate Judge was right in refusing the plaintiffs a decree for possession of the wet lands In refusing this relief the Subordinate Judge relied on the judgments of this Court in *Kumaraswami Mudaliar* v *Narayanaswami*[1], and *Thimanna Bhatta* v *Rama Bhatta*[2] Before discussing those cases we think it necessary to refer to earlier pronouncements of the Privy Council.

In *Banga Chandra Dhur Biswas* v *Jagat Kishore Chowdhuri*[3], while recognising that in a suit in respect of an alienation by a Hindu widow of property belonging to her husband's estate the burden of proving legal necessity lies upon the purchasers, their Lordships referred to the weight to be attached to recitals in the deeds when direct evidence is not available In delivering the judgment of the Board Lord Buckmaster, L.C , said :

"But in such a case as the present their Lordships do not think that these recitals can be disregarded, nor on the other hand, can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance, and cannot lightly be set aside , for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper inquiry to satisfy himself of its truth The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then when proof of actual inquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time "

The next case is *Venkata Reddi* v *Rani of Wadhwan*[4] This was an appeal to the Privy Council from a judgment of this Court which contained the following statement of law :

"It is not disputed that the onus lay upon the defendant to prove the necessity for the sale, but having regard to the great lapse of time since the transaction took place, that is, about 82 years, perhaps the highest on record, it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienations made at more or less recent dates In such circumstances, presumptions are permissible to fill in the details which have been obliterated by time "

Their Lordships accepted this statement without qualification

In an appeal from the Bombay High Court, *Magniram Sitaram* v *Kasturbhai Manibhai*[5], the Privy Council had to consider the validity of a permanent lease granted by a Shebait nearly 100 years before the suit Their Lordships held that as it was not possible to ascertain what were the circumstances under which the lease was granted the Court should assume that it was made for necessity and so valid. Lord Buckmaster who delivered the judgment in this case also, said .

"At the lapse of 100 years, when every party to the original transaction has passed away, and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, it is only following the policy which the Courts always adopt, of securing as far as possible quiet posssion to people who are in apparent lawful holding of an estate, to assume that the grant was lawfully and not unlawfully made "

1 (1932) 36 L W 186
2. A.I R 1938 Mad 300
3 (1916) 31 M L J 563 L R 43 I A 249 : I.L R, 44 Cal 186 (P C).
4 (1919) 38 M L J 393 L R 47 I A 6 I L R 43 Mad 541 (P C)
5 (1921) 42 M L J 501 : L R 49 I A 54: I L R 46 Bom. 481 (P.C.).

Although the alienation in that case was not by a Hindu widow the Shebait's power of alienation only arose on necessity

Kumaraswami Mudaliar v. *Narayanaswami*[1] was decided by Venkatasubba Rao and Curgenven, JJ, who in the course of their judgment said that it was well settled that when a long period had elapsed between an alienation and the suit to set it aside, presumptions were permissible to fill in the details which had been obliterated by time and that the rule applied not only where there were recitals in deeds but where there are not This judgment was quoted with approval by Madhavan Nair and King, JJ, in *Thimmanna Bhatta* v *Rama Bhatta*[2].

Where owing to the lapse of time it is impossible to produce evidence of necessity in support of an alienation by a Hindu widow or evidence of inquiry by the alienee and there is no ground for suspecting abuse by the widow of her power to alienate for a necessary purpose, we consider that the cases quoted provide ample authority for the Court disregarding the ordinary rule of Hindu Law and drawing an inference in favour of the validity of the alienation In such circumstances it would be unreasonable not to recognise an exception to the rule, otherwise grave injustice might result. It would, however, be wrong to draw an inference in favour of validity if there are grounds for suspecting the genuineness of the transaction Where a reasonable doubt does exist the Court should in our judgment refuse to draw the presumption.

Now, what is the position here? The deed by which Paddamma conveyed the wet lands to her own brother contains no recital, but the fact that she purported to sell to such a close relation nearly six acres of valuable wet land for the sum of Rs. 100 is sufficient in itself to cast doubt on the validity of the transaction The Subordinate Judge wrongly stated that the consideration for the sale was Rs 500. The price which the deed says was paid, Rs 100, works out at something less than Rs. 17 per acre Then there is the further fact that the brother to whom the property was conveyed made a gift of a half of it to another brother eight years later If by reason of family necessity Paddamma was compelled to sell the wet lands it is unreasonable to suppose that she would have to sacrifice them for Rs. 100 The fact that she sold the lands for such a small sum to one of her brothers who later shared them with another brother certainly gives reason for suspecting that her intention was to benefit the members of her own family. In these circumstances it would not be equitable to draw a presumption in favour of the validity of the sale and we must hold that the plaintiffs are entitled to possession of the wet lands as well as dry lands The decree of the Subordinate Judge will be amended accordingly

The appellants are entitled to the costs of the appeal which will be paid by the respondents according to their respective interests in the properties in suit. The memorandum of cross objections is dismissed with costs in favour of the plaintiffs. The plaintiffs are also entitled to costs in all the Courts below

The case will be remanded to the trial Court with directions to ascertain under Order 20, rule 12, of the Civil Procedure Code what the plaintiffs are entitled to by way of mesne profits, both past and future, and to pass a final decree

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE RAJAMANNAR

Reddem Babi Reddi and another .. *Appellants**

v.

Vadla Veerayya and others .. *Respondents.*

Suit for declaration of title—Vendors of plaintiffs found to have no title—Basis of possession neither pleaded nor in issue—Declaration of right to possession, if can be granted

Where in a suit for declaration of right to property it was found that neither of the vendors of the plaintiffs had any title to the property conveyed and there was no claim in the plaint based on

1. (1932) 36 L W. 186.
2. A I R 1938 Mad 300.

*S.A. No. 372 of 1945. 28th February, 1946.

possession and no issue regarding possession was framed, it is not open to the Court to grant a declaration that the plaintiffs are entitled to possession though they are not the owners, until such time as they are ousted in due course of law by the person entitled to possession by virtue of title to the property

Maikal Servai v *Thambuswami Servai*, (1914) 25 I C 934, followed

Appeal against the decree of the District Court, Anantapur, in A S No 200 of 1943, preferred against the decree of the Court of the District Munsiff, Anantapur, in O S. No 322 of 1942

Ch Raghava Rao for Appellants

Respondents not represented.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit filed by the respondents in the Court of the District Munsiff of Anantapur for a declaration of their right to the suit property The plaintiffs claimed under a sale deed dated 10th June, 1940, from one Gangamma and Basanna. The appellants resisted the suit, claiming title to the property under a sale deed from the third defendant

Admittedly, the suit property originally belonged to one Gorba Ramayya, who died issueless The two questions of fact which the lower Courts had to determine were (1) whether the plaintiffs' vendors had any title to the property, and (2) whether the third defendant was entitled to the property Both the Courts found that the third defendant's relationship with the deceased Ramayya was not satisfactorily proved and that he could not be held entitled to the property as Ramayya's heir Of the two vendors of the plaintiffs, it was conceded that the second vendor Basanna had no right to the property But the plaintiffs contended that Gangamma, as the widow of the brother of Ramayya, was entitled to succeed. The learned District Munsiff of Anantapur accepted this contention and decreed the suit On appeal, the learned District Judge of Anantapur held—and held rightly—that Gangamma, as the widow of the brother of Ramayya, was not entitled to succeed as a heir. The result was that neither of the vendors of the plaintiffs had any title to convey to the plaintiffs

On this finding, the learned District Judge ought to have dismissed the suit. He however granted a decree in these terms

"There will be a declaration that they (plaintiffs) are entitled to possession of it(the suit property), though they are not the owners, until such time as they are ousted in due course of law by the person entitled to possession by virtue of title to the property "

It may be mentioned that on the date of the institution of the suit, the suit property was under attachment under section 146 (1) of the Code of Criminal Procedure in pursuance of an order passed by the Joint Magistrate, Penukonda, on the 5th of February, 1941 That order was passed because the Magistrate found that it was difficult for him to decide as to who had been in possession of the property. It is significant to note that in the plaint the plaintiffs, apart from claiming a declaration of their right to the suit property on the ground that they were entitled to it, did not specifically put forward any case based on their possession. Nor did they claim a lesser relief similar to that granted by the learned District Judge. In the trial Court, no issue was raised with regard to possession. In these circumstances it was not open to the learned District Judge to have granted even the limited relief which he did grant on the ground that it was reasonably established that the possession of the property after Ramayya's death was with Gangamma and that after the sale it was with the plaintiffs. The appellants were not apprised of this case by the allegation in the plaint and the issues framed on the pleadings. The decision of a Division Bench of this Court in *Maikal Servai* v. *Thambuswami Servai*[1], relied on by the learned advocate for the appellants, appears to govern the facts of this case The learned Judges observe .

"No doubt a suit is maintainable on such a basis (basis of possession) but if plaintiff seeks to rely on it, it should be clearly set up so that the contesting defendants may know what they have to meet.

1. (1914) 25 I C 934.

There is no indication of such a claim in the plaint, which, as already stated, bases the suit on title by inheritance and nothing else. We consider, following *Somasundaram Chettiar* v *Vadivelu Pillai*[1] and *Sairo Kumari Debi* v *Govind Shaw Tanti*[2], that plaintiff should not have been given a decree on the basis of a claim not set up in the plaint or raised in the issues."

The second appeal is allowed and the suit is dismissed with costs throughout.

V P S —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE HAPPELL.

Bhogavilli Parakala Rao and others ... *Petitioners**

v.

Bhogavilli Subba Rao and others *Respondents*

Court-Fees Act (VII of 1870 *as amended in Madras), section* 7 (iv-*A*), (v) *and schedule II, Article* 17-*B —Suit for partition and possession—Alienations and decrees impugned—Father holding on behalf of alienees—Court-fee payable*

The plaintiffs sued for partition and possession of joint family properties. The alienees of some of the items of family properties were also impleaded as defendants. The plaintiffs averred that their father and his mother, defendants 1 and 2 in the suit had fraudulently executed deeds purporting to alienate family properties and further stated that notwithstanding those alienations they along with their father were in joint possession of the said properties. A consolidated Court-fee of Rupees one hundred was paid on the plaint under Article 17-B of the Court-fees Act, as amended in Madras.

Held, that in the absence of particulars given by the plaintiffs as to the alienations, the first defendant should be taken to be in possession of the alienated properties on behalf of the alienees and that being so the plaintiffs cannot be regarded as being in joint possession and court-fee was payable under section 7 (*v*) in respect of the relief claimed.

Held further, that in respect of decrees passed against the father, which the plaintiffs were impugning, court-fee was payable under section 7 (*iv*-A) of the Act on the footing that they were *eo nomine* parties to the decree.

Ramaswami Aiyangar v *Rangachariar*, (1940) 1 M L J 32 I L R 1940 Mad 259 (F B) explained.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Ellore, dated 1st March, 1945, in Check Slip No 644/VII in O S No 113 of 1944.

B V Ramanarasu for Petitioners.

The Government Pleader (*K Kuttikrishna Menon*) for Respondents.

The Court delivered the following

JUDGMENT.—This petition relates to the Court-fee payable in respect of a suit for partition. The plaintiffs-petitioners filed O S No 113 of 1944 in the Subordinate Judge's Court of Ellore for partition and impleaded eight persons as defendants. The first defendant is their father, the second defendant the mother of the first defendant, the third defendant sister of the first, the fourth defendant the husband of the deceased sister of the first defendant, and defendants 5 to 8 are alleged to be alienees in respect of properties belonging to the family. In paragraph 3 of the plaint, it is stated that defendants 1 to 3 had been creating documents in collusion which alienated joint family properties, but that the properties had remained in the joint possession of the plaintiffs and the first defendant. It is also asserted in this paragraph that any decrees obtained against the first defendant alone could not be enforced against the plaintiffs' interests in the joint family properties. The actual reliefs prayed for were a direction for the partition of the A, B and C schedule properties into three shares and the allotment of two of them to the plaintiffs and future mesne profits from the date of the plaint till delivery of possession. A fee of Rs 100 was paid under Article 17-B of Schedule II of the Court-fees Act. The Court-fee examiner was of opinion that the plaint had been undervalued and that Court-fee had to be paid under section 7 (*v*) of the Act on the footing that even if the properties remained in the possession of the first

1. (1908) I L R 31 Mad 531. 2 (1887) I L R. 2 Cal. 418

*C.R.P No. 513 of 1945 14th February, 1946.

defendant they must be deemed to be held by him on behalf of the alienees and not on behalf of the plaintiffs, and that Court-fee under rule 2 of the Rules framed under section 9 of the Suits Valuation Act and published in Civil Rules of Practice and G O. Volume I, page 218, as item 6 had also to be paid in respect of decrees obtained by strangers against the father. The learned Subordinate Judge, in the order which is now the subject matter of this revision petition, has merely adopted the report of the Court-fee Examiner. He states that he agrees with the objections taken by the Court-fee Examiner and that if the plaintiffs do not want any relief in respect of the alienations and decrees the alienees and the decree-holders impleaded as parties may be given up, otherwise the Court-fee demanded must be paid.

It is argued for the petitioners that the consolidated Court-fee of Rs 100 which has been paid is the correct Court-fee in accordance with the decision of the Full Bench of this Court in *Ramaswami Aiyangar* v *Rangachariar*[1], since (1) as laid down in that case in a suit for partition Court-fee has to be paid only under Article 17-B of Schedule II where, as in this case, the plaintiffs are in joint possession of the family properties, section 7 (*v*) being applicable only where the plaintiff is seeking relief in respect of possession when he is out of possession, and since (2) as also laid down, a plaintiff has not to pay Court-fee for the cancellation of a decree unless he was *eo nomine* a party to the suit in which the decree was passed.

The Court-fee Examiner whose report has been adopted by the Subordinate Judge has not overlooked the decision of the Full Bench in *Ramaswami Aiyangar* v. *Rangachariar*[1], and it is begging the question to say that a Court-fee is not payable in respect of the recovery of possession of the property alienated because the plaintiffs have remained in joint possession of the properties What was laid down by the Full Bench was that as far as the general relief in a suit for partition was concerned, Article 17-B of Schedule II was applicable when the plaintiffs were in joint possession and that it was not necessary for the plaintiffs to pay Court-fee as for recovery of possession In the present case, however, the plaintiffs have given no particulars as to the alienations, and as the Court-fee Examiner has pointed out, in the absence of such particulars the first defendant must be deemed to be in possession on behalf of the alienees. That being so, the plaintiffs cannot be regarded as being in joint possession and Court-fee has to be paid under section 7 (*v*)

As regards the question whether any Court-fee is payable in respect of the decrees to which reference is made in paragraph 3 of the plaint, it was pointed out in *Ramaswami Aiyangar* v *Rangachari*[1], that a plaintiff must pay the fee prescribed by section 7 (*iv-A*) in respect of decrees passed against him in a suit in which he has been *eo nomine* impleaded as a party, but that in cases where he has not been impleaded *eo nomine* he may be entitled to ignore the decree and pay no Court-fee as for its cancellation The question was raised whether, even though the plaintiff has not been impleaded *eo nomine*, Court-fee must nonetheless be paid by reason of the amendment to the rules, the amendment referred to by the Court-fee Examiner, which has been published in Civil Rules of Practice and G O Volume 1, page 218, as item 6. In my opinion, this amendment does not affect the ruling of the Full Bench. If the plaintiff is entitled to ignore the decree he is not asking for the decree to be cancelled and so the rule does not apply The question in each case is whether he is entitled to ignore the decree I have been referred to a decision of Horwill, J, in *Battripad* v. *Neelakandan*[2], and it was suggested that Horwill, J., in his judgment has not followed the Full Bench decision in *Ramaswami Aiyangar* v *Rangachari*[1], because of the amendment to the rules referred to above. Horwill, J, however, in his judgment does not refer to the rules. What he said was that cases where the decree was against the karnavan of a tarwad in his representative capacity or against the manager of a joint Hindu family as such were not covered by the Full Bench decision. In such cases, in his opinion, the effect from the point of view of the Court-fee payable would be the same as a decree against a member of the joint family *eo nomine* I respectfully agree with the view taken by Horwill, J. A decree

1. (1940) 1 M.L J. 32 · I.L.R. 1940 Mad. 259
2. (1943) 2 M L J 396 · I L.R. 1944 Mad. 430

against the manager of a joint family as such *prima facie* affects the shares of all the members, and a member cannot claim the whole of his share until he has got rid of the decree In the present case full particulars have not been supplied by the plaintiff, but on the information available his share is *prima facie* affected by the decree and he must pay Court-fee as directed

The petition is dismissed with costs.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE KUPPUSWAMI AYYAR

Asuram and others .. *Appellants**

Hoarding and Profiteering Prevention Ordinance (1943), *sections* 9 *and* 13—*Refusal to sell camphor by merchants who though having a stock were not dealers in camphor—If offence*

Where persons are charged with refusal to sell camphor when it was demanded, it is found that though they were in possession of camphor they were not 'dealers' in camphor as defined in the Hoarding and Profiteering Prevention Ordinance, they are not liable to be punished for the offence with which they are charged

Appeal against the order of the Court of the Chief Presidency Magistrate of Egmore, Madras, in C C No 1275 of 1945, dated 21st December, 1945.

V Rajagopalachari and *T. A Rajagopal* for Appellants

The Crown Prosecutor (*P Govinda Menon*) for the Crown.

The Court delivered the following

JUDGMENT.—The 13 accused before Court who were trading as partners in stationery articles and other sundry articles have been convicted by the Chief Presidency Magistrate, Madras, for an offence punishable under sections 9 and 13 of the Hoarding and Profiteering Prevention Ordinance

The case against them was that they had stock of camphor and refused to sell when two customers came and wanted to purchase it The appellants' case is that they were not dealers in camphor, that therefore they told the customers that they were not dealing in camphor and had no stock for sale Evidence has been let in that in a room in which they had their stock, camphor was found in some unopened packets The appellants admitted that two persons came and asked for camphor, and that they told them that they had no camphor for sale as they were not dealing in it There is no evidence to show that the appellants were dealers in camphor The word " dealer " has been defined under section 2 (*d*) of the Hoarding and Profiteering Prevention Ordinance as a person carrying on business by selling any article whether wholesale or retail There is absolutely no evidence to show that these appellants were carrying on trade in camphor at any time As a matter of fact, four persons were examined to show that they were not dealing in camphor and they had not been cross-examined by the prosecution The only evidence is that in a room in the building in which they had stock, camphor was found. Unfortunately the appellants tried to let in evidence to show that this camphor belonged to D W 5 which has been rightly disbelieved by the Magistrate, and there is also evidence that the packets in which camphor was kept showed that they were despatched from Bombay to Madras by the first appellant to his own address. But that will not help the prosecution because it will only show that the first accused was in possession of camphor obtained by him from Bombay The charge is not for being in possession of camphor but for refusing to sell camphor when it was demanded. If the appellants are not dealers as defined under the Ordinance, then they are not liable to be punished for the offence with which they have been charged.

I therefore set aside the convictions and sentences and acquit the appellants. The fine, if already collected, will be refunded

V.P S. *Appeal allowed.*

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*Cr A No. 928 of 1945. 25th March, 1946

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SOMAYYA AND MR JUSTICE YAHYA ALI.

Subbaraya Goundan .. *Appellant**

v

Samiappa Goundan and others .. *Respondents*

Civil Procedure Code (V of 1908), section 47—Decree-holder auction-purchaser taking only symbolical possession and not actual possession—Subsequent suit to obtain delivery—Not barred by section 47

Where symbolical possession is taken by the decree-holder aution-purchser, section 47 of the Code of Civil Procedure is not a bar to a separate suit by him for obtaining actual possession The delivery of symbolical possession even erroneously operates to give the person put in possession a fresh cause of action and places the judgment debtor in the position of a trespasser. It cannot be said that the symbolical possession obtained is a mere nullity and that actual delivery must be obtained in the execution department and not by suit

Govind v *Venkatasastrulu*, (1907) 17 M L J 598 and *Kamayya* v. *Mahalakshmi* (1927) 53 M L J. 339 followed.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in A S No 179 of 1943, preferred against the decree of the Court of the District Munsiff, Dharapuram, in O S No 104 of 1941.

S Venkatesa Aiyangar for Appellant

P N Appuswami Aiyar and *Mandalam Venkataramana Aiyar* for Respondents.

The Judgment of the Court was delivered by

Somayya, J—The second defendant in the suit is the appellant before us The only point which arises for decision in this second appeal is whether section 47, Civil Procedure Code, is a bar to the present suit The plaintiff-respondent purchased the property in execution of a decree passed on a fifth mortgage of the property The suit on the fifth mortgage was commenced on the 6th April, 1927, and the sale at which the plaintiff became the purchaser was held on the 31st January, 1933 The second defendant purchased the properties in question in execution of a money decree in O S No 811 of 1925 The purchase was on the 27th September, 1927, and he got into possession sometime thereafter. After the plaintiff-respondent purchased the property on the 31st January, 1933, he applied in 1934 for delivery of possession. On account of some obstruction possession was not given Then he filed E A No 66 of 1937 for delivery of possession and a fresh warrant was issued Ex P-8 contains the various orders passed on E A No 66 of 1937 We need only refer to the note made on the 11th June, 1937 It states " Delivery of item 1 alone, *i e*, S Nos 309 and 310 taken by the petitioner " S. Nos 309 and 310 are items 2 and 3 in the present suit and they are the only items which are involved in this second appeal Ex P-3 is the delivery receipt passed by the auction-purchaser and it says that possession was given to him by the amin ; but it uses the expression " common possession " The corresponding Tamil expression may mean either common or ordinary or general possession The trial Court went into the question and held that actual possession was given to the auction-purchaser and that section 47 was therefore no bar On appeal the Subordinate Judge did not record a finding on this question, but held that as the purchase by the appellant was susbequent to the filing of the suit on the fifth mortgage, the purchase made by the appellant was affected by the doctrine of *lis pendens* He therefore dismissed the appeal. The question whether a separate suit is barred under section 47 depends upon whether possession was taken in the execution department and not on the question of *lis pendens* The question therefore is whether there was such possession taken by the plaintiff-respondent as would avoid the bar under section 47, Civil Procedure Code. We have already referred to E A No. 66 of 1937 and to Ex. P-3 Mr Venkatesa Aiyangar, learned advocate for the appellant draws our attention to the evidence of the second plaintiff-second res-

*S A. No 2147 of 1944. 3rd January, 1946

pondent, who gave evidence as P W 2 The statement in the chief examination is that he and the first plaintiff got symbolical delivery in 1937 The evidence of the karnam examined as P W 1 is also to that effect Therefore we shall proceed on the assumption that the plaintiffs got symbolical delivery in 1937 Thereafter they filed the present suit for actual possession Even so, we are of opinion that section 47 is not a bar to the present suit In *Govind* v *Venkata Sastrulu*[1], the facts were exactly similar There, as here, symbolical possession was taken by the plaintiff-decree-holder-auction-purchaser and he commenced the suit out of which the second appeal arose for actual possession It was contended that section 244 of the then Code corresponding to section 47 of the present Code was a bar The lower Courts overruled the objection and granted a decree In second appeal it was argued that symbolical possession obtained in the case was a mere nullity, that the auction-purchaser was bound to obtain actual delivery in the execution department and that, therefore, a separate suit was barred by section 244 of the Code of 1882. Miller and Munro, JJ., refused to accept this contention and held that a separate suit lay for actual possession The learned Judges said this

"There is a considerable body of authority in the Calcutta High Court for the position that the delivery of symbolical possession even erroneously operate to give the person put in possession a fresh cause of action and place judgment-debtor in the position of a trespasser (*Vide* for instance *Harimohan Shaha* v *Baburali*,[2] and the case of *Shanker* v *Narasingrau*[3], which is on all fours with the presnt case) With the view taken in these cases we agree and we are of opinion that the suit was not barred by limitation by section 244 of the Civil Procedure Code "

This decision was doubted by Devadoss, J , in *Kamayya* v *Bhimarasette Pardesi*[4]. But that decision was reversed on appeal by Wallace and Madhavan Nair, JJ , in *Kamayya* v *Mahalakshmi*[5] As pointed out by Wallace and Madhavan Nair, JJ , the question is really concluded by the decision of the Judicial Committee in *Thakur Sri Radhakrishna* v *Ram Bahadur*[6] The decision in *Govind* v *Venkata Sastrulu*[1], was referred to by Wallace and Madhavan Nair, JJ , and so also the conflicting decisions of the various High Courts We are of opinion that we ought to follow the decision in *Govind* v *Venkata Sastrulu*[1] and that in *Kamayya* v *Mahalakshmi*[5], and hold that even if the respondent got only symbolical possession in 1937, it is tantamount to actual possession so far as the judgment-debtor or his representative is concerned, and that, therefore, section 47 is not a bar to the present suit

The second appeal fails and is dismissed with costs

K S. *Appeal dismissed.*

[THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Allahabad *)

PRESENT —SIR PATRICK SPENS, *Chief Justice*, SIR S VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ

The Governor-General in Council .. *Appellant*†

v

Shiromani Sugar Mills, Limited (in liquidation) .. *Respondent.*

Companies Act (*VII of* 1913), *sections* 171, 230 *and* 232 *and Income-tax Act* (*XI of* 1922), *section* 46 —*Assessment made after winding up order—Competency of Income-tax Department to proceed under section* 46 *of the Income-tax Act for its recovery without leave under section* 171 *of the Companies Act—Crown debts—Preference in the winding up—" Other legal proceeding " in section* 171*—Meaning of—Government of India Act* (1935), *section* 226 (1)*—Interpretation—Exclusion of jurisdiction of High Court —Principle governing.*

An order for assessment of income-tax of a company was made on 25th February, 1943, for the year of assessment 1941-42 and the tax was fixed at a particular amount But in the meanwhile, the company had been ordered to be wound up a very considerable time before the assessment was made The income-tax authorities decided to adopt the procedure provided by section 46 of the

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1 (1907) 17 M L J 598
2 (1897) I L R 24 Cal 715
3. (1897) I L R 22 Bom 667.
4 (1924) 49 M L J 303
5 (1927) 53 M L J 339
6 (1917) 34 M L J 97

* I.L R. (1945) All 352 . 1945 F L J 193

† Civil Appeal No 2 of 1945. 11th March, 1946.

Income-tax Act and forwarded a recovery certificate under sub-section (2) of section 46 to the Collector who in turn made a demand for the recovery of the amount assessed as arrears of land revenue On an application by the liquidators of the company under sections 171, 228 and 233 of the Companies Act, it was directed that under section 169 of the Act, the income-tax authorities should be restrained from proceeding without leave of the Court with the subsisting proceedings It was in effect held that the Crown was not entitled to any priority or preference, that leave of the Court under section 171 of the Companies Act was required prior to taking steps to put into action the machinery of section 46 of the Income-tax Act and that the High Court was free to deal with this matter and its jurisdiction was not in any way affected by section 226 of the Constitution Act On appeal,

Held In section 230 of the Companies Act a modified priority is expressly provided for a certain limited class of crown debts. The priority expressly so given to crown debts is not confined solely to Crown debts The Crown is bound by the provisions of the Indian Companies Act, and is bound, in regard to the provisions relating to the liquidation of companies, "to a statutory scheme or administration wherein the prerogative right of the Crown to priority no longer exists." The Crown is accordingly not entitled to any prerogative priority, or preferential rights or treatment, save those expressly conferred and limited by the Act itself, in particular by section 230 and sub-section (2) of section 232. The particular arrears of income-tax, which the Income-tax authorities had endeavoured to collect through the machinery of section 46 of the Income-tax Act do not come within the prescribed class of taxes for which the Crown can claim even the limited priority given by section 230 of the Companies Act In respect of them, the Crown ranks as an ordinary unsecured creditor.

Section 171 of the Companies Act must be construed with reference to other sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the Act No narrow construction should be placed upon the expression "or other legal proceeding" in that section It need not and therefore should not be confined to "original proceedings in a Court of first instance, analogous to a suit, initiated by means of a petition similar to plaint" The words can and should be held to cover distress and execution proceedings in the ordinary Courts. Accordingly the words "other legal proceeding" in section 171 comprise any proceeding by the revenue authorities under section 46 (2) of the Income-tax Act and before forwarding the requisite certificate under section 46 (2) to the Collector, which would put the machinery for the collection of the arrears of income-tax as arrears of land revenue into motion, the Income-tax authorities should have applied in the liquidation under section 171 of the Companies Act for leave of the winding up Court.

Section 226 of the Constitution Act applies to the jurisdiction conferred on the Allahabad High Court by the Companies Act.

In the circumstances, by reason of the making out and forwarding to the Collector of a certificate in the form and manner prescribed by section 46 (2) of the Income-tax Act, thereby putting into operation the machinery of section 46 for the collection of the arrears of income-tax in question as arrears of land revenue, an Act was done in the collection of revenue, and in granting the injunction the High Court was exercising original jurisdiction in a matter concerning an act done in the collection of the revenue.

The last words of sub-section (1) of section 226 "according to the usage and practice of the country or the law for the time being in force" can only qualify the words immediately preceding "concerning an act done or ordered in the collection thereof"

In the circumstances, it cannot be said that at the stage when the procedure unauthorised by law was in fact put in force, the officials concerned were not acting *bona fide* or were acting absurdly Accordingly, it must be held that section 226 (1) of the Constitution Act applies to the case, and that in granting the injunction appealed against the High Court was purporting to exercise original jurisdiction concerning an act ordered or done in the collection of the revenue *bona fide* and not absurdly believed to be according to the law for the time being in force, and that by reason of section 226 (1) and the decision in *Spooner* v. *Jadow*, (1850) 4 M I A 353, the High Court had no jurisdiction in the matter and their order was *ultra vires* and void.

Anomalies in section 226 commented upon.

M. C. Setalvad, Senior Advocate, Federal Court (*G. N Joshi*, Advocate, Federal Court, with him), instructed by *K. Y. Bhandarkar*, Agent, for Appellant.

K. N. Katju, Senior Advocate, Federal Court (*S S. Dhawan*, Advocate, Federal Court, with him), instructed by *Naunit Lal*, Agent, for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The respondent company prior to being wound up, as hereinafter mentioned, carried on the business of proprietors of sugar mills in the Basti District of the United Provinces The company was believed to have made some profits for the year ending the 30th May, 1940, but it was not until the 25th of February, 1943, that an order for assessment of income-tax, was made for the year of assessment 1941-42, and the tax was eventually fixed at Rs. 18,493-12-0. In the meantime, however, a petition to wind up the company had been presented

on the 26th of November, 1941, a provisional liquidator had been appointed on the 7th of December, 1941, and finally, on the 17th of April, 1942, a winding up order had been made by the High Court at Allahabad It will be noticed therefore that the company had been ordered to be wound up a very considerable time before the assessment was made On the 10th of March, 1943, a notice of demand was served on the Official Liquidators of the respondent company under section 29 of the Indian Income-tax Act, 1922 (hereinafter referred to as "the Income-tax Act"). On the 13th of March, 1943, the Official Liquidators pointed out to the Income-tax Department that the proper procedure to be followed was for the Income-tax Department to lodge a claim in the winding up in respect of the arrears of tax alleged to be due from the company.

Instead of adopting the procedure suggested, the Income-tax Department decided to adopt the procedure provided by section 46 of the Income-tax Act, and accordingly, on the 8th of August, 1944, the Income-tax Department sent an 'Arrear Demand' to the Official Liquidators with the intimation that the demand was recoverable as arrears of land revenue, and that a recovery certificate under sub-section (2) of section 46 had been forwarded to the Collector of Allahabad In fact, on the 10th of July, 1944, the Official Liquidators had already received from the Collector of Allahabad a demand for the recovery of the said amount of Rs. 18,493-12 0 as arrears of land revenue. In these circumstances, the Official Liquidators having taken legal advice, made an application to the High Court under sections 171, 228 and 233 of the Indian Companies Act, 1913, against the Governor-General in Council, through the Fourth Additional Income-tax *cum* Excess Profits Tax Officer, Excess Profits Tax Circle, Cawnpore, as respondent, asking for an order that the respondent be directed to put in a formal claim to the Official Liquidators in respect of the said sum of Rs 18,493-12-0 and praying for an order restraining the Collector from effecting recovery of the said sum as arrears of land revenue, pending the disposal of the application On the same day, *viz*, the 21st of September, 1944, the Court made an interim order restraining the Collector from effecting recovery of the said sum. The application finally came before Iqbal Ahmad, C J, and Braund, J, for argument and disposal, and on the 13th of November, 1944, judgment was delivered and a final order passed by the said learned Judges The said order directed that under section 169 of the Indian Companies Act, 1913, the respondent should be restrained from proceeding without leave of the Court with the subsisting proceeding before the Collector at Allahabad for the recovery of the said sum of Rs. 18,493-12-0 as an arrear of land revenue in accordance with section 46 of the Income-tax Act, provided nevertheless that the said injunction should be without prejudice to such application, if any, as the respondent might be advised to make under section 171 of the Indian Companies Act, 1913, for leave to proceed with such recovery. The said order also provided that the present appellant should pay to the Official Liquidators the sum of Rs. 538-12-0 as costs.

It may be conveniently noticed here that the actual form of the order was not technically accurate. Section 169 of the Indian Companies Act, 1913, only authorises the Court to restrain proceedings, "at any time after the presentation of the petition for winding up a company under this Act, and *before* making an order for winding up the company." In view of the fact that the winding up order had already been made, no injunction in this case could be granted under section 169. No formal objection, however, was taken in regard to this matter, and it is clear from the judgment of the learned Judges that in this respect the substantial question was whether or not the appellant should have obtained the leave of the Court under section 171 of the Indian Companies Act prior to taking steps to put into action the machinery of section 46 of the Income-tax Act The effect of the decision was that such leave was required, and that as it had not been obtained, the Court could restrain further action under section 46. The learned Judges also held that the objection raised by the present appellant to the exercise by the Allahabad High Court of any jurisdiction at all in the matter based on section 226 of the Government of India Act, 1935, was ill-founded, and that they were free to deal with the

matter. They granted, however, a certificate under section 205 of the last mentioned Act and accordingly the appellant has come to this Court, and asks that the order of the 13th of November, 1944, be set aside, both on the ground that the High Court had no jurisdiction to deal with the matter, in view of the provisions of section 226 of the Government of India Act, 1935, and on the ground that the action taken by the revenue authorities under section 46 of the Income-tax Act did not require any prior leave of the Court under section 171 of the Indian Companies Act, 1913.

We propose to deal with the second question first. Section 171 of the Indian Companies Act, 1913, is in the following terms

"When a winding up order has been made or a provisional liquidator has been appointed, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose"

In the High Court considerable discussion seems to have taken place as to the general position of debts due to the Crown and the prerogative rights of the Crown in a liquidation of a company under the Indian Companies Act, 1913 As the point was also raised in this Court, we think that it is desirable to dispose of that matter before discussing the matters that more directly arise under section 171 The necessity on behalf of the Crown of obtaining the prior leave of the Court under section 171 is in a measure connected with the question of the extent to which the prerogative or priority rights of the Crown have been affected by the enactment of the Indian Companies Act, 1913.

In section 230 of that Act a modified priority is expressly provided for a certain limited class of Crown debts. [*See* sub-section (1) (*a*)] These include debts in respect of revenue, taxes, cesses and rates payable to the Crown, but the provision is limited to those due from the company at a prescribed date and having become due and payable within the twelve months next before that date, the prescribed date being the date of the commencement of the winding up, or in the case of a company ordered to be wound up compulsorily, which has not previously commenced to be wound up voluntarily, the date of the winding up order Moreover, the priority expressly so given to Crown debts is not confined solely to Crown debts They have to rank *pari passu* for payment with certain debts due to local authorities, certain debts in respect of salary or wages due to clerks, servants, labourers or workmen, compensation payable under the Workmen's Compensation Act, 1923, and other classes of debts and expenses, and all have to abate equally if the assets are insufficient to meet them in full. In this connection it is material also to notice sub-section (2) of section 232 of the Indian Companies Act, 1913. This sub-section indicates that an express enactment was considered necessary to provide that the consequences set out in sub-section (1) of section 232 should not apply to proceedings of the Government. To these indications of the manner in which the Crown prerogative has been expressly dealt with by the provisions of the Indian Companies Act may be added a general consideration derived from the whole scheme of the Act in regard to the administration of assets in the liquidation of companies It is difficult to believe that where so much consideration has been given to rights of priority and the respective rights and position of secured and unsecured creditors, and the order and manner in which their debts are to be discharged, the Crown was to remain outside the scheme and unaffected by the provisions of the Act, except to the extent to which Crown rights have been expressly dealt with. It is difficult to think of any reason for qualifying the priority in respect of the Crown debts specified in section 230 (1) (*a*), if it was intended that other debts due to the Crown should enjoy unqualified priority This provision is in marked contrast to the provision contained in the Indian Insolvency Acts allowing priority in respect of "all debts due to the Crown or to any local authority." (Presidency Towns Insolvency Act, III of 1909, section 49 ; and Provincial Insolvency Act, V of 1920, section 61) It was mainly the express provisions of section 209 of the English Companies Act, 1908 (now re-enacted as section 264 of the Companies Act, 1929), and this general consideration of the whole statutory administrative scheme of company's assets in a liquidation provided for in the later English

Companies Act, and the anomalies and difficulties which would ensue if the Crown were not bound thereby, that led the English Court of Appeal in *Webb & Co*, In re[1] and the House of Lords (affirming the above decision) in *Food Controller* v *Cork*[2], to determine, once and for all that the Crown is not entitled to priority in payment of its claims over, or to issue process to obtain payment in full in priority to other creditors of a company in liquidation, except as expressly provided by section 209 of the English Act of 1908, now section 264 of the English Companies Act, 1929 These sections very closely resemble section 230 of the Indian Companies Act, 1913, in so far as a very limited priority and preference is expressly given to certain Crown debts in the liquidation of a company Having regard to the similarity of the provisions of the Indian Companies Act, 1913, to the English Acts of 1908 and 1929, in respect of the general statutory scheme of administration of a company's assets in liquidation, and to the correspondence between the provisions of section 230 of the Indian Act with those of section 209 or section 264 of the English Acts, it is not surprising that later Indian decisions on the rights of the Crown in a liquidation in India have followed the reasoning of the English cases above referred to Cf In re *Damagoria Coal Co, Ltd.*[3], *Secretary of State* v *The Punjab Industrial Bank, Ltd. (in liquidation)*[4], *The Bank of Bihar, Ltd, Patna* v *The Secretary of State and others*[5], In the matter of *the Northern Bengal Co, Ltd (in liquidation)*[6], *Governor-General in Council through the Commissioner, Income-tax of Punjab, N-W F and Delhi Provinces* v *Sargodha Trading Co, Ltd (in liquidation)*[7] Counsel for the appellant invited our attention to these cases, but did not suggest that they were in any way wrongly decided, or that the scheme of the administration of assets of a company in liquidation under the Indian Act was materially different to that enacted by the English Acts, notwithstanding the decisions to the contrary in In the matter of *West Laikdih Coal Co, Ltd*[8] and *Commissioner of Income-tax* v *Official Liquidators, Agra Spinning and Weaving Mills Co*[9] We have no hesitation in coming to a conclusion and holding that the Crown is bound by the provisions of the Indian Companies Act, 1913, and is bound, in regard to the provisions relating to the liquidation of companies, " to a statutory scheme of administration wherein the prerogative right of the Crown to priority no longer exists " (Lord Wrenbury in *Food Controller* v. *Cork*[2], at page 672). The Crown is accordingly not entitled in our judgment, to any prerogative, priority, or preferential rights or treatment, save those expressly conferred and limited by the Act itself, in particular by section 230 and sub-section (2) of section 232

Before we turn to the more detailed consideration of section 171 of the Indian Companies Act, it may also be noted that the particular arrears of income-tax, which the appellant has endeavoured to collect through the machinery of section 46 of the Income-tax Act, do not come within the prescribed class of taxes for which the Crown can claim even the limited priority given by section 230 of the Indian Companies Act. Having regard to the delay in assessment, these arrears were not due from the company at the date of the winding up order. In respect of them the Crown ranks as an ordinary unsecured creditor. Nonetheless, the appellant claims not only that the appellant is free to exercise in this case the machinery of section 46 of the Income-tax Act, but that also the appellant is free to collect these arrears in full without any obligation to account to the liquidators or to bring into Court any excess above what the appellant might receive if a claim as an unsecured creditor had been made It appears that, excepting the power of the Court under section 171 to impose a condition at the time of granting leave, there is no machinery or provision in the Act to compel the appellant to account for or bring into Court any such excess Accordingly, this claim to exercise the machinery of section 46, if successful, would in effect enable the Crown to secure for the arrears

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1 (1922) 2 Ch 369

2 (1923) A C 647.

3 (1931) I L R 59 Cal 327

4 (1931) I L R 12 Lah. 678.

5 A.I.R. 1932 Pat. 1.

6 I.L R (1937) 1 Cal 684

7 (1943) I L R. 24 Lah 706 (F B)

8 (1925) I L R 53 Cal 328

9 (1933) I L R. 56 All 685

set out above, the very priority to which both in England and India the Crown has been held not entitled.

Hitherto, though it may be that attempts have been made to collect arrears of income-tax due from a company in liquidation through the machinery of section 46 of the Income-tax Act, the income-tax authorities have, upon objection being taken by the liquidators, submitted to prove their claim in the liquidation like any other creditor. Cf *Governor-General in Council through the Commissioner of Income-tax, Punjab, N.-W F. and Delhi Provinces* v *Sargodha Trading Co*, *Ltd.* (*in liquidation*)[1] above referred to. This they are now not prepared to do and the appellant presses for the sanction of the Court to be given to the right to exercise the machinery of section 46 of the Income-tax Act in respect of arrears of income-tax due from a company in liquidation uncontrolled by the Court in which the company is being wound up.

How then is this claim in fact formulated? Counsel for the appellant urges (*a*) that under section 46 of the Income-tax Act, the very special machinery therein set forth is not in any way limited in its application and is *prima facie* therefore applicable to the facts of this case and available and appropriate for the collection of arrears of income-tax due from the respondent company, whether it be in liquidation or not, (*b*) that the powers of the Court in a winding up under the Indian Companies Act to control, restrain or interfere with claims or actions or remedies of creditors are very limited and are confined to sections 169 and 171; (*c*) that the former section gives jurisdiction during the period only between the presentation of a petition and the making of an order for the winding up of the company and only upon the application of a company, a creditor, or a contributory, to restrain "further proceedings in any suit or proceeding against the company upon such terms as the Court thinks fit", and (*d*) that section 171 by contrast provides that "after a winding up order has been made or a provisional liquidator appointed, no suit or other legal proceeding shall be proceeded with or commenced against the company, except by leave of the Court and subject to such terms as the Court may impose" Counsel emphasised the difference in wording between the two sections—"any suit or proceeding" in section 169, "no suit or other legal proceeding" in section 171. He argued that for a proceeding to be within the scope of section 171, it must be (*i*) in the nature of a suit, relying for this purpose on the words "suit or other," and the decision of a Lahore Full Bench (Tek Chand, Monroe, and Beckett, JJ.) in *Shukantla* v. *The Peoples Bank of Northern India, Ltd.* (*in liquidation*)[2], and (*ii*) a proceeding in a Court of Law, in which way only could proper effect be given to the phrase "legal proceeding" as contrasted with the word "proceeding" only The correctness of the decision in the Lahore Full Bench above referred to, namely, that a suit under Order 21, rule 63 of the Civil Procedure Code, for a declaration of title against a company in liquidation cannot be commenced without the previous leave of the Court which has passed the winding up order, cannot, we think, be doubted But the observations of the learned Judges must of course be read in the light of the point before them for decision, which was a very narrow one As a statement of law of general application, we, as were the learned Judges in the Allahabad High Court in this case, are unable to accept the narrow construction put upon the expression "or other legal proceeding" in the judgment of the Lahore Full Bench. In our judgment, it need not, and therefore should not, be confined to "original proceedings in a Court of first instance, analogous to a suit, initiated by means of a petition similar to a plaint." Section 171 must, in our judgment, be construed with reference to other sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the Act In particular, we would refer to section 232. Section 232 appears to us to be supplementary to section 171 by providing that any creditor (other than Government) who goes ahead, notwithstanding a winding up order or in ignorance of it, with any attachment, distress, execution or sale, without

1. (1943) I.L.R. 24 Lah. 706 (F.B.). 2. (1941) I.L.R. 22 Lah. 760 (F.B.).

the previous leave of the Court, will find that such steps are void. The reference to "distress" indicates that leave of the Court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary Court of law Moreover, the scheme of the application of the company's property in the *pari passu* satisfaction of its liabilities, envisaged in section 211 and other sections of the Act, cannot be made to work in co-ordination, unless all creditors (except such secured creditors as are "outside the winding up" in the sense indicated by Lord Wrenbury in his speech in *Food Controller* v *Cork*[1]), are subjected as to their actions against the property of the company to the control of the Court Accordingly, in our judgment, no narrow construction should be placed upon the words "or other legal proceeding" in section 171 In our judgment, the words can and should be held to cover distress and execution proceedings in the ordinary Courts In our view, such proceedings are other legal proceedings against the company, as contrasted with ordinary suits against the company.

That still leaves open the question whether action under section 46 of the Indian Income-tax Act is covered by the phrase "other legal proceeding" Clearly it is not a proceeding in an ordinary Court of law But we see no reason why in British India no "legal proceeding" can be taken otherwise than in an ordinary Court of law, or why a proceeding taken elsewhere than in an ordinary Court of law, provided it be taken in a manner prescribed by law and in pursuance of law or legal enactment, cannot properly be described as a "legal proceeding." If it be considered that the effect of the Income-tax authorities putting the machinery of section 46 of the Income-tax Act in motion for the collection of arrears of income-tax is to bring into operation all the appropriate legal enactments relating to the collection of land revenue in the Province concerned, it is, in our judgment, very difficult to say that they are not taking a "legal proceeding" In fact, in this very case, had the company not been in liquidation, the appellant would have had the choice at his option of (*a*) proceeding by "suit in the ordinary Courts in respect of the arrears or (*b*) by forwarding (under section 46 (2) of the Income-tax Act) to the Collector the requisite certificate, initiating and putting into force collection of the arrears as arrears of land revenue under and in accordance with the appropriate provisions of the U P. Land Revenue Act (III of 1901). Surely such last mentioned action on the part of the Income-tax authorities would be the adoption of another legal proceeding for the collection of the arrears as opposed to the institution of a suit. The proviso to section 46 (2) empowers the Collector if he so chooses, to exercise all the powers which a Civil Court may exercise in respect of the attachment and sale of debts due to a judgment-debtor. If the income-tax officer will be taking a "legal proceeding" when he moves the Collector—as we think he must be held to do—to realise the tax by attachment and sale of debts due to the assessee, it can make no difference in principle that the Collector is asked to exercise his summary powers under the Land Revenue Law.

Accordingly, we agree with the learned Judges of the Allahabad High Court in holding that the words "other legal proceeding" in section 171 of the Indian Companies Act, 1913, comprise any proceeding by the revenue authorities under section 46 (2) of the Indian Income-tax Act, and that accordingly before forwarding the requisite certificate under section 46 (2) to the Collector, which would put the machinery for the collection of the arrears of income-tax as arrears of land revenue into motion, the appellant should have applied in the liquidation under section 171 of the Companies Act for leave of the winding up Court.

That leaves the question whether, inasmuch as the appellant moved under section 46 (2) without prior leave of the Court, the High Court at Allahabad, as the Court having jurisdiction under the Indian Companies Act to wind up the respondent company, had jurisdiction to interfere by injunction or otherwise to prevent the completion of the collection of the arrears of land revenue. Were it not for the provisions of section 226 of the Government of India Act, 1935, we

1. (1923) A C. 647 at 671

should without hesitation answer this question in the affirmative and dismiss this appeal. Section 226 must, however, be considered in the light of decided cases and of the facts of this case. The section runs as follows :

> "(1) Until otherwise provided by Act of the appropriate legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.
>
> (2) A Bill or amendment for making such provision as aforesaid shall not be introduced into or moved in a Chamber of the Federal or a Provincial Legislature without the previous sanction of the Governor-General in his discretion or, as the case may be, of the Governor in his discretion "

The first point to be determined is whether the section applies to the jurisdiction exercised by the Allahabad High Court under the Indian Companies Act at all. This mainly depends upon the construction to be given to the words " any original jurisdiction " Counsel for the appellant submitted that " original " was used in distinction to " appellate," and that the word " any " covered all jurisdiction over proceedings of any kind which commence and originate in the High Court He instanced the extraordinary original jurisdiction of the Court under clause 9 of the Letters Patent, the jurisdiction in respect of infants and lunatics under clause 12, the ordinary original criminal jurisdiction under clause 15, the testamentary and intestate jurisdiction under clause 25, and the matrimonial jurisdiction under clause 26 of the Letters Patent He accordingly submitted that various types of original jurisdiction were conferred on the High Court by the Letters Patent, and that original jurisdiction could equally well be conferred by any valid enactment and that original jurisdiction had in fact been conferred by sections 2 and 3 of the Indian Companies Act, 1913, on the Allahabad High Court in respect of companies whose registered offices are situate within the territorial jurisdiction of that Court. On the other hand, counsel for the respondent stressed the well-known origin and history of this section (see *Best & Co* v. *The Collector of Madras*[1], *Govindarajulu Naidu* v. *Secretary of State*[2] and *Dewarkhand Cement Co , Ltd* v *Secretary of State*[3]) and asked us to construe it as a section " with an ancestral history " (see *Hansraj Gupta and others* v *Dehra Dun Moossoorie Electric Tramway Co , Ltd*[4]) and to confine the meaning of the words " original jurisdiction " to the original jurisdiction exercised by the Supreme Courts and by the High Courts of Madras, Calcutta and Bombay, as successors to the Supreme Courts, and to hold that High Courts, other than those three, though they may exercise special or particular jurisdiction conferred on them by Letters Patent or Statute, exercised no original jurisdiction within the meaning of the words as used in section 226 In our opinion, the history itself of the section does not justify such a method of construction. It was clearly re-enacted in section 106 (2) of the Government of India Act, 1915, in a setting where it was impossible to confine its operation to the High Courts of Madras, Calcutta and Bombay, [*vide* section 106 (1)] and where [*vide* section 101 (5)] the High Court at Allahabad was expressly referred to amongst the High Courts. In the Government of India Act, 1935, the very opening words of section 226 and sub-section (2) thereof show that it is no mere repetition of a section without consideration It has again been deliberately re-enacted with appropriate provision for its repeal or modification having regard to the changes in the constitution We note too that the Allahabad Letters Patent in clause 30 refer to " any final judgment, decree or order made in exercise of original jurisdiction " That orders in company matters do not differ in substance from decrees in suits, is shown by section 199 of the Indian Companies Act providing that such orders shall be enforced in the same manner in which decrees in a suit may be enforced The present order of the High Court is thus in effect a decree in a suit granting an injunction. We are accordingly unable to accept the argument on behalf of the respondent and feel bound to hold that section 226 applies to the jurisdiction conferred on the Allahabad High Court by the Indian Companies Act, 1913

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1. (1918) 35 M L.J 23 at 26
2. (1926) I.L.R 50 Mad. 449 53 M.L.J 355
3. I L R. (1939) Bom 320
4. (1932) 64 M.L.J 403 L R. 60 I.A. 13 . I L R 54 All 1067 (P C)

It was suggested on behalf of the respondent Company that the opening words "until otherwise provided by Act of the appropriate legislature", need not necessarily be confined to future legislation, and that if the Indian Companies Act had in fact "provided otherwise," the section would not apply to jurisdiction exercised under the Indian Companies Act In our judgment, this construction also cannot be maintained Reading the two sub-sections of section 226 together, in our judgment, that which is contemplated is future legislation enacted in accordance with the changes in the constitution So far there has been no such legislation, either by way of repeal or modification The section with all its anomalies, so constantly commented upon by High Court after High Court and before now by this Court, remains on the Statute Book Once again, we point out this anomalous situation that if a District Court, such as the District Court at Cawnpore, upon which jurisdiction under the Companies Act of 1913 has been conferred under the proviso to section 3 (1) of the Act, had been dealing with this claim of the Crown, or the matter had come before the High Court itself in its appellate jurisdiction, neither the District Court nor the High Court would have had to consider section 226. But so long as the section remains on the Statute Book, it is our duty to give to it what we consider to be its true effect, however capricious that may be

The next two points which require consideration are ·

(*a*) Did the High Court purport to exercise jurisdiction in a matter concerning the revenue or concerning any act ordered or done in the collection thereof; and

(*b*) if so, do the last words of the sub-section "according to the usage and practice of the country or the law for the time being in force" qualify "original jurisdiction in any matter concerning the revenue" as well as "concerning any act ordered or done in the collection thereof"?

As regards (*a*), there was much discussion before us in this case, as there had been in other cases, whether a matter concerning an act ordered or done in the collection of the revenue would not also be included in a matter concerning the revenue, or whether it would not be something additional to or different from a matter concerning the revenue In *Dewarkhand Cement Co, Ltd* v *Secretary of State*[1], the learned Judge (Rangnekar, J) basing himself on an observation in the judgment delivered by Lord Phillimore in *Alcock Ashdown and Co, Ltd* v. *Chief Revenue Authority, Bombay*[2], came to the conclusion that two different ideas are expressed in the respective parts of the section, the first refers to the preliminary proceedings taken for the purpose of determining the amount of the revenue in any case, and the second to the machinery to enforce payment of the revenue so determined Another view suggested in the course of the hearing before us was that all claims directly in respect of revenue by or against the Crown would be matters concerning the revenue, whereas claims against individual officials in respect of acts ordered or done in the collection of the revenue might not be included in matters concerning the revenue and that accordingly the latter words had to be added for the protection of officials and to prevent indirect attacks upon the revenue It is not, in our judgment, necessary to come to any final conclusion on these views On the facts of this case, we are satisfied that by reason of the making out and forwarding to the Collector of a certificate in the form and manner prescribed by section 46 (2) of the Income-tax Act, thereby putting into operation the machinery of section 46 for the collection of the arrears of income-tax in question as arrears of land revenue, an act was done in the collection of the revenue, and in granting the injunction in this case the High Court was exercising original jurisdiction in a matter concerning an act done in the collection of the revenue

As regards (*b*), we are satisfied that grammatically the last words of the sub-section in question can only qualify the words immediately preceding "concerning any act done or ordered in the collection thereof"

1. I.L R (1939) Bom 320 I L R 47 Bom. 742 (P.C).
2. (1923) 45 M.L.J 592 L R 50 I A. 227 :

That brings us to the last and final point of construction. Was the action of the appellant which is challenged in this case an act done in the collection of the revenue "according to the usage and practice of the country or the law for the time being in force"? It was not suggested that the usage or practice of the country comes into this case The question to be determined is, was the action of the appellant in the collection of the revenue "according to the law for the time being in force" within the true meaning to be given to these words in the light of the facts of this case and decided cases The learned Judges in the Allahabad High Court were able to come to their conclusion in favour of the respondent on the ground that what the appellant did in this case was contrary to the law for the time being in force, in the sense of all the law applicable to the matter, including the Indian Companies Act, 1913. An attempt has been made to collect arrears from a company in liquidation by a procedure not authorised by law generally. Accordingly, they say, the matter is outside the limitations to jurisdiction imposed by section 226. It has been urged on behalf of the appellant that the learned Judges were wrong in allowing the phrase "law for the time being in force" to embrace all law for the time being in force in respect of the act ordered or done in the collection of the revenue, and that they should have confined the phrase to law directly concerned with the collection of the revenue We are not prepared to differ in this respect from the learned Judges in the Court below It would be difficult, if not impossible, to delimit satisfactorily the law which had to be considered in relation to any matter from that which could be excluded from consideration. But in our view the more important question in this case is whether the Act ordered or done in the collection of the revenue must in truth and in fact have been "according to the law for the time being in force," or whether it is sufficient that the person or persons ordering or doing the act should *bona fide* and not absurdly have believed that the act was "according to the law for the time being in force" Counsel for the appellant pressed us with the view that the latter only was sufficient to bring this case within section 226 (1) and he relied upon the well-known case of *Spooner* v. *Jadow*[1] The learned Judges in the Court below were able to come to the conclusion that the principles of *Spooner* v *Jadow*[1], did not apply when the complaint was that the whole procedure was not according to the law for the time being in force, or that the revenue authorities had no legal power to do what they had done, as opposed to complaint of some irregularity in carrying out procedure authorised by law or an irregularity in doing something which they had power to do We regret that with respect we feel bound to differ from the learned Judges in their limited view of the application of the principles of *Spooner* v. *Jadow*[1]. On the facts of that case, we doubt if the officials were only guilty of a mere irregularity of procedure But be that as it may, it seems to us that there is really no difference in principles between the case of an official believing *bona fide* and not absurdly that some illegal step which he takes in executing a legally authorised procedure is itself according to the law for the time being in force, and that of another official believing *bona fide* and not absurdly that the procedure which he adopts in a particular case is itself according to the law for the time being in force. The following passage from the opinion delivered by Lord Campbell at pages 379-80 appears to us to apply as much to one such *bona fide* mistake as to the other:

"The point, therefore, is whether the exception of jurisdiction only arises where the defendants have acted strictly, according to the usage and practice of the country, and the regulations of the Governor in Council But upon this supposition the proviso is wholly nugatory, for if the Supreme Court is to inquire whether the defendants in this matter concerning the public revenue were right in the demand made, and to decide in their favour only if they acted in entire conformity to the Regulations of the Governor and Council of *Bombay*, they would equally be entitled to succeed, if the Statutes and the Charters contained no exception or proviso for their protection Our books actually swarm with decisions putting a contrary construction upon such enactments, and there can be no rule more firmly established, than that if parties *bona fide* and not absurdly believe that they are acting in pursuance of statutes, and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act In this case it may well be that the warrant against the goods of *Tookaydass* did not authorise the taking the goods of

1. (1850) 4 Moore's I A 353

Hurgovundass, or even that *Hurgovundass* might not be liable for the arrears of "quit-rent" which accrued before he became owner of the house Still the Collector was evidently of opinion, that a distress might be made for the whole of the arrears due, and that it was sufficient to introduce into the warrant the name of *Tookaydass*, in whose name the house continued to be registered The other defendant never could have doubted the sufficiency of the warrant If Indian revenue-officers have fallen into a mistake, or without bad faith have been guilty of an excess in executing the duties of their office, the object of the Legislature has been, that they should not be liable to be sued in a civil action before the Supreme Courts Liability to be prosecuted criminally, stands upon a totally different foundation"

If accordingly we are of opinion that the certificate prescribed by section 46 (2) was made out and forwarded to the Collector under that sub-section by officials *bona fide* and not absurdly believing that the machinery under section 46 was legally proper and available for the collection of the arrears of income-tax in question due from the respondent Company, we must conclude that section 226 (1) applies to this case, and that in granting the injunction appealed against the High Court was purporting to exercise original jurisdiction concerning an act ordered or done in the collection of the revenue *bona fide* and not absurdly believed to be according to the law for the time being in force, and that by reason of section 226 (1) and the decision in *Spooner* v *Jadow*[1] the High Court had no jurisdiction in the matter, and their order was *ultra vires* and void.

Now so far as the facts of this case on the record are concerned, it is not absolutely clear on which date the certificate under section 46 (2) of the Income-tax Act was made out and forwarded to the Collector The first intimation which the liquidators received that the section 46 procedure was going to be adopted was the receipt on the 10th July, 1944, of the demand from the Collector for the recovery of the arrears as arrears of land revenue This was fully explained to the liquidators by a letter from the Income-tax Department of the 8th August, 1944, which made clear that a certificate had been forwarded to the Collector under section 46 (2) It is true that these steps were taken more than a year after the liquidators had suggested that the proper course for the Income-tax Department was to lodge a claim in the liquidation But on those facts it is difficult to suggest that in July and August, 1944, the Income-tax authorities were not acting *bona fide* or were acting absurdly in determining to proceed under section 46 (2) Nor has any one suggested anything of that sort in this case It is also true that in the other similar cases the Income-tax Department had previously submitted to lodge claims for arrears claimed due from a company in liquidation in the liquidation But it still is not impossible that a perfectly *bona fide* and not absurd determination was come to in this case to try to recover the arrears by a procedure believed to be available to the Income-tax authorities according to their view of the law for the time being in force Indeed the number of points raised and debated before us and the High Court show that it would be very difficult to hold that the challenged procedure had clearly been adopted *mala fide* or absurdly At the stage therefore when the procedure which we have held to be unauthorised by law was in fact put in force in this case, we can see no reason for holding that the officials concerned were not acting *bona fide* or were acting absurdly.

In this case, on the facts, the appellant must in our judgment succeed on the plea that section 226 (1) of the Government of India Act, 1935, deprived the High Court of jurisdiction in the matter. Any further action under section 46 (2) of the Income-tax Act in the future will be taken in the light of this judgment and may not be saved by the provisions of the said section 226

The appellant fails on all points except the objection taken under section 226 of the Government of India Act, 1935 By reason of that we must allow the appeal and declare that the order of the High Court of the 13th November, 1944, must be set aside, and that in lieu thereof there shall be substituted an order dismissing the application of the liquidators of the 21st September, 1944, and directing repayment by the liquidators of the sum, if any, received for costs in respect of the said application in the High Court, but without any further order as to costs. We make no order as to costs in respect of this appeal to this Court

G.R V S —— *Appeal allowed.*

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1. (1850) 4 Moore's I A 353

[PRIVY COUNCIL.]

(On appeal from the Federal Court of India *)

PRESENT.—LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, LORD SIMONDS AND LORD GODDARD.

Punjab Province .. .. *Appellant*†

v.

Daulat Singh and others .. *Respondents.*

Government of India Act (1935), *section* 298—*Scope and effect of—Contravention of—Proper test—Punjab Alienation of Land* (*Second Amendment*) *Act* (*Punjab Act X of* 1938)—*If* ultra vires *of the Punjab Provincial Legislature—Severability of valid from* ultra vires *portion—Proper form*

Sub-section (1) of section 298 of the Constitution Act confers a personal right on every subject of His Majesty domiciled in India, and the general legislative powers conferred respectively on the Federal Legislature and the Provincial Legislature by sub-section (1) of section 99 are subject, *inter alia* to the provisions of section 298.

It is not correct to say that in applying the terms of sub-section (1) of section 298, it is necessary for the Court to consider the scope and object of the Act which is impugned, so as to determine the ground upon which the Act is based It is not a question of whether the impugned Act is based only on one or more of the grounds specified in section 298 (1) but whether its operation may result in a prohibition only on these grounds Hence the proper test as to whether there is a contravention of the sub-section (1) of section 298 is to ascertain the reaction of the impugned Act on the personal right conferred by the sub-section, and, while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal right, the object of the Act however laudable will not obviate the prohibition of sub-section (1).

The avoidance of benami transactions and the recovery of possession by the alienor, which are enacted by section 5 of the Punjab Land Alienation (Second Amendment) Act (X of 1938) for the first time, involve a prohibition within the meaning of sub-section (1) of section 298 of the Constitution Act and such prohibition is only on grounds of descent because such will be the result in some of the cases affected by the impugned Act The persons affected by the provisions of the impugned Act are prohibited "from acquiring, holding or disposing of property" within the meaning of sub-section (1) of section 298.

Hence, the provisions of hen ew section 13-A enacted by section 5 of the impugned Act, do involve a contravention of sub-section (1) of section 298 of the Constitution Act and are *ultra vires* of the Provincial Legislature They are neither authorised nor protected from such a result by sub-section (2) (*a*) of section 298 which only excepts from the operation of sub-section (1) a prohibition of future action It follows that the benefit of sub-section (2) (*a*) cannot be claimed for the impugned Act so far as it purports to operate retrospectively and to that extent it was beyond the legislative powers of the Provincial Legislature

If the retrospective elemenr were not severable from the rest of the provisions, the whole Act would have to be declared *ultra vires* and void But the retrospective element in the impugned Act is easily severable By the deletion of the words "either before or" from the early part of sub-section (1) of the new section 13-A, enacted by section 5 of the impugned Act, the rest of the provisions of that Act can be left to operate validly

The form of severability adopted by the Federal Court, *viz*, by a classification of the particular cases on which the impugned Act may happen to operate, involving an enquiry into the circumstances of each individual case, is not warranted There are no words in the Act capable of being so construed and such a course would in effect involve an amendment of the Act by the Court, a course which is beyond the competency of the Court.

D N Pritt, K C and *J M. Pringle, K C*, for Appellant.

Ronald F Roxburgh, K C and *M Gravenor Hewins* for Respondents

Their Lordships' Judgment was delivered by

LORD THANKERTON.—This is an appeal from the judgment and order of the Federal Court of India,* dated the 8th May, 1942, by which the judgment and decree of the High Court of Judicature at Lahore, dated the 27th February, 1941, dismissing appeals by the appellant and respondents Nos. 2 and 3 respectively from

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* I L R (1942) Lah 643 5 F L J 73

† P C. Appeal No. 62 of 1945

30th January, 1946.

the judgment and decree of the Subordinate Judge, IV class, Sialkot, dated the 22nd July, 1940, were set aside and the case sent back to the High Court with a direction for the framing of proper issues and the remittal of the case to the trial Court for further trial and decision

The only question in this appeal is whether, and, if so, to what extent, section 5 of the Punjab Alienation of Land (Second Amendment) Act, 1938, Punjab Act X of 1938 is rendered invalid by section 298 of the Government of India Act, 1935, as being *ultra vires* of the Punjab Provincial Legislature The Punjab Act of 1938, which may be conveniently referred to as the impugned Act, by section 5 purported to insert a new section 13-A in the Punjab Alienation of Land Act, 1900 (Indian Act XIII of 1900), which may be referred to as the principal Act, the new section being expressly given retrospective effect

The principal Act, as amended up to the 1st June, 1939, when the impugned Act came into operation, deals with permanent alienation of land in Part II (sections 3 to 5), and temporary alienation of land in Part III (sections 6 to 13) of the Act The expression " land " is defined in section 2 (3) and, broadly stated, it covers agricultural land and buildings, and excludes building sites and buildings in a town or village , and, by section 2 (4), " permanent alienation " is defined to include sales, exchanges, gifts, wills and grants of occupancy rights By section 3 it is provided that, except where the alienor is not a member of an agricultural tribe, or the alienor is a member of an agricultural tribe and the alienee is a member of the same tribe or of a tribe in the same group, a permanent alienation of land shall not take effect as such unless and until sanction is given thereto by a Deputy Commissioner, and section 14 provides that any such permanent alienation shall, until such sanction is given, or if such sanction has been refused, take effect as a usufructuary mortgage in form (*a*) permitted by section 6 for such term not exceeding twenty years and on such conditions as the Deputy Commissioner considers to be reasonable

As regards temporary alienations of land, section 6 (1) provides that if a member of an agricultural tribe mortgages his land and the mortgagee is not a member of the same tribe, the mortgage shall be made in one of certain prescribed forms, and section 9 (1) provides that, if a member of an agricultural tribe makes a mortgage of his land in any manner or form not permitted by or under the Act, the Deputy Commissioner shall have authority to revise and alter the terms of the mortgage so as to bring it into accordance with such form of mortgage permitted by or under the Act as the mortgagee appears to him to be equitably entitled to claim.

Perhaps the most important section of the principal Act for present purposes is section 4, under which the Local Government, for which the Provincial Government was substituted in 1937, were, by notification in the Official Gazette, to determine what bodies of persons in any district or group of districts were to be deemed to be agricultural tribes or groups of agricultural tribes for the purposes of the Act. Accordingly, by Punjab Government Notification No 63, dated the 18th April, 1904, it was determined that for the purpose of the Act—

"(1) In each district of the Punjab mentioned in column 1 of the Schedule attached to this notification, all persons either holding land or ordinarily residing in such district and belonging to any one of the tribes mentioned opposite the name of such district, in column 2, shall be deemed to be an " agricultural tribe " within the district

(2) All the 'agricultural tribes' within any one district shall be deemed to be a group of agricultural tribes "

The Schedule has from time to time been amended.

In view of the restrictions on alienation, a practice grew up of adopting the method of acquiring and holding property *benami*, so familiar in India, so that transfers from members of agricultural tribes were made into the name of a person belonging to the same tribe or group of tribes as *benamidar*, for the benefit of a person

who was not a member of such tribe or group of tribes. Such cases came before the Court on various occasions, but, in order to explain the situation under which the transaction here in question came into being, and which would appear to have led to the passage of the impugned Act, it will be sufficient to refer to two of these cases, for that purpose only, and not for the purpose of the consideration by this Board, of the correctness of the decisions In *Shamas-ud-Din* v *Allah Dad Khan*[1], the Lahore High Court held the ostensible vendee entitled to recover possession of the property from the vendor, whatever might be the legal position between the former and the alleged non-agricultural beneficiary, this is the ordinary law relating to *benami* transactions In 1932, a Full Bench of the same Court in *Qadir Baksh* v *Hakam*[2], held in an action by an alleged *benamidar* to recover possession of the property from an alleged beneficiary that the latter was entitled to prove that such was the real relationship between the parties, that such a transaction was an evasion of the provisions of the principal Act, but that it was not necessarily void *ab initio*, and the possession of the beneficiary was not necessarily unlawful in every case, though the Court would not lend its support to either confederate, and the possession must remain where it lay

In the year 1933, one Jumman, the father of respondents Nos. 2 and 3, executed a mortgage with possession to respondent No. 1, who is a member of an agricultural tribe, of certain agricultural land and rights in the District of Sialkot in the Schedule to the Notification of 1904, to secure repayment of Rs. 1,500 to one Gopal Das It is not disputed that respondent No 1 was a *benamidar* and that Gopal Das, who is not a party to the present suit, was the real beneficiary. While the mortgage deed has not been produced, it is admitted that it is not in a form permitted by the principal Act, and that it would fall into the category referred to in section 9 (1) of the principal Act.

In February, 1939, the impugned Act was enacted, and, by a notification under section 1 (2) of the Act, it came into force on the 1st June, 1939. By section 5 of the impugned Act it is provided that before section 14 of the principal Act, a new heading and four new sections should be inserted. The new heading and the first of the new sections, so far as relevant to the present case, read as follows:

"III—A —*Benami Transactions*.

13—A (1) When a sale, exchange, gift, will, mortgage, lease or farm purports to be made, either before or after the commencement of the Punjab Alienation of Land (Second Amendment) Act, 1938, by a member of an agricultural tribe to a member of the same agricultural tribe or of a tribe in the same group, but the effect of the transaction is to pass the beneficial interest to a person who is not a member of the same tribe or of a tribe in the same group, the transaction shall be void for all purposes, and the alienor shall be entitled to possession of the land so alienated, notwithstanding the fact that he may have himself intended to evade the provisions of this Act

(2) If the Deputy Commissioner either of his own motion or on the application of the alienor, is satisfied after making such enquiries as may be prescribed from the parties concerned, and recording evidence that an alienation is void under the provisions of the preceding sub section he shall by order in writing, after recording his reasons, eject any person in occupation of the land under such sale, exchange, gift, will, mortgage, lease or farm and place the alienor in possession."

A proviso to sub-section (2) of the new section 13-A provides for compensation to the person ejected for improvements in the discretion of the Deputy Commissioner. Sub-section (3) is not material. It should be added that by section 21 of the principal Act the jurisdiction of the Civil Courts is excluded in any matter which the Provincial Government or any Revenue-Officer is empowered by the Act to dispose of, and that any rights of appeal conferred are to persons within the Revenue Department.

In October, 1939, Jumman, the mortgagor, having died, his sons, respondents Nos 2 and 3, applied under section 5 of the impugned Act to the Deputy Commissioner for avoidance of the mortgage and recovery of possession of the mortgaged property, on the ground that the real beneficial mortgagee was not respondent

1. A.I R. 1925 Lah 65. 2 (1932) I.L R 13 Lah. 713 (F B).

No. 1, but Gopal Das, who was not a member of an agricultural tribe Thereupon respondent No 1, on the 27th November, 1939, presented a petition against respondents Nos. 2 and 3, in the Court of the Subordinate Judge, First Class, Sialkot, alleging that, in view of section 298 of the Government of India Act, 1935, the impugned Act was void and *ultra vires* of the Punjab Legislature, and claiming (*a*) a declaration of his right as mortgagee with possession, (*b*) a declaration that respondents Nos. 2 and 3 had no right to take possession through the Deputy Commissioner after taking steps under the impugned Act, and (*c*) a permanent injunction restraining them from obtaining possession of the land by taking out proceedings under the impugned Act In a written statement respondents Nos 2 and 3 maintained the validity of the impugned Act, that section 298 of the Act of 1935, was not contravened by the impugned Act, and that the present appellant was a necessary party By order dated the 27th May, 1940, the appellant was made a party, and on the 22nd June, 1940, preliminary issues were fixed, namely,

1. Had the Punjab Legislature no jurisdiction to enact Act No X of 1938 (Punjab) for reasons mentioned in paras 8 and 9?

2. If not, has the Civil Court jurisdiction to determine the question of *benami* nature of the transaction in dispute?

Issue No 2 raises no separate point, as the answer to No 1 necessarily determines the answer to No 2.

At that time, and until after the decision of the Federal Court, section 298 provided as follows .—

"298 (1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India

(2) Nothing in this section shall affect the operation of any law which—

(*a*) prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognised by the law as being a class of persons engaged in or connected with agriculture in that area to any person not belonging to any such class; or

(*b*) recognises the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law.

(3) Nothing in this section shall be construed as derogating from the special responsibility of the Governor-General or of a Governor for the safeguarding of the legitimate interests of minorities."

By section 4 of the India and Burma (Temporary and Miscellaneous Provisions) Act, 1942, two amendments of section 298 were made, the only material one being the substitution of a new paragraph (*a*) of sub-section (2) of section 298, as follows .—

"(*a*) prohibits, either absolutely or subject to exceptions, dispositions of agricultural land situate in any particular area and owned by a person belonging to some class recognised by the law as being a class of persons engaged in or connected with agriculture in that area or as being an aboriginal tribe, in favour or for the benefit of any person not belonging to that class."

By section 6 (2) of the Act of 1942, it was provided that the amendments made by sections three and four of the Act in the Government of India Act, 1935, should be deemed to have been made therein immediately before the passing thereof It follows that, for the purposes of this appeal, their Lordships must have regard only to section 298 as amended by the Act of 1942, and another result has followed the amendment, *viz*, that certain contentions which have been dealt with by the Courts in India, are no longer available and the question of the validity of the impugned Act will rest on the decision of one or at most of two questions.

The first question is whether the impugned Act, by section 5, contravenes sub-section (1) of section 298 of the Act of 1935 If it does not contravene sub-section (1), the attack on the impugned Act fails, and so does the suit. If, on the other hand, section 5 of the impugned Act does contravene sub-section (1) of section 298, the question arises whether the appellant can claim the benefit of sub-section (2), and here the respondent No. 1 admits that the transaction here in question does

fall within the class of disposition described in paragraph (*a*) of sub-section (2), but he maintains that it does not authorise or afford protection for retrospective legislation, and that the retrospective effect of the new section 13-A may be easily eliminated by the deletion of the three words "either before or" from the early part of sub-section (1) thereof, leaving the impugned Act otherwise operative

The Subordinate Judge appears to have assumed that the impugned Act contravened sub-section (1) of section 298 of the Act of 1935, and, as regards sub-section (2), which in its then form related only to sales and mortgages, he pointed out that the impugned Act prohibited, in addition, exchanges, gifts, wills, leases and farms, and said, "The Act, which cannot be declared void in part and upheld in the rest, is therefore *ultra vires* the Provincial Legislature as it contravenes the provisions of section 298 (1) of the Government of India Act, 1935" This ground of judgment was obviated by the subsequent amendment of sub-section (2) of section 298 The learned Judge also held that section 292 of the Act of 1935 barred the authority of the Provincial Legislature to legislate retrospectively in view of a Full Bench ruling of the Allahabad High Court (*Atiqa Begam* v. *Abdul Mughni Khan*[1]), but that ruling was overruled by a decision of the Federal Court (*United Provinces* v. *Atiqa Begam*[2]) before the appeal in the present case came before the Lahore High Court, and no further contention was based on section 292 The contention that the impugned Act, so far as intended to operate retrospectively, was not authorised or afforded protection by sub-section (2) of section 298 does not appear to have been made before the Subordinate Judge

On an appeal taken by the present appellant, and an appeal by the present respondents Nos 2 and 3 the High Court of Lahore dismissed both appeals, and affirmed the decree of the Subordinate Judge. The learned Judges held that the impugned Act contravened the provisions of sub-section (1) of section 298, in respect that it operated merely by reason of descent alone, that sub-section (2)—as it then stood—could only save sales and mortgages, and did not authorise or protect the avoidance of sales and mortgages retrospectively, and that there would be no difficulty in holding that the impugned Act was valid so far as future sales and mortgages were prohibited On this last point the learned Judges differed from the Subordinate Judge, but this did not affect the result so far as the mortgage in suit was concerned, it having been executed five years before the impugned Act was passed Dalip Singh, J, in the leading judgment did discuss the question of the validity of the principal Act, and expressed a somewhat tentative opinion, but Monroe and Sale, JJ, found it unnecessary to express any opinion. Their Lordships will refer to this matter later

The High Court having certified in terms of section 205 of the Act of 1935 that the case involved a substantial question of law as to the interpretation of that Act, the present appellant appealed to the Federal Court, which, by a majority judgment (Gwyer, C J and Varadachariar, J, *diss.* Beaumont, J)[3] held that the impugned Act contravened sub-section (1) of section 298, in respect that in some cases it would operate as a prohibition on the ground of descent alone and agreed with the High Court that the benefit of sub-section (2) of section 298 could not be claimed for the impugned Act so far as it purports to avoid transactions entered into or titles acquired before the impugned Act became law, as the word "prohibit" can only mean the forbidding of a transaction, and such a direction is appropriate only in respect of transactions to take place subsequently to the date of the direction. Having so far followed the views of the High Court, Varadachariar, J, with whom Gwyer, C J., agreed, proceeded to express a view of the matter, which was not supported before the Board, and with which their Lordships are unable to agree. After stating that the question was not exactly one as to the validity or invalidity of the Act, but rather whether the prohibitions contained in it were operative or not, the learned Judge said that the circumstances in which the provisions of the impugned Act will be inoperative must be limited to cases where the beneficiaries under the

1. I.L R. (1940) All 455 (F B) 110 3 F.L J. 97.
2. (1941) 1 M.L.J. Supp 65 1940 F.C R.
3. I.L.R. (1942) Lah. 643 · 5 F.L.J. 73.

benami transactions fall outside the terms of the notifications under section 4 of the principal Act only on the ground that they are not descended from members belonging to the specified tribes The learned Judge further said, that in this view, the decree dismissing the appeal to the High Court could not stand, and that enquiry would be necessary as to the ground on which Gopal Das, the alleged beneficiary under the suit mortgage, was said to be a non-agriculturist, as, without such an investigation, it could not be decided whether the suit transaction is void under the impugned Act.

In his dissenting judgment, Beaumont, J, sums up his opinion in these words.

"I would however rest my judgment that section 13-A of the impugned Act is not *ultra vires* the Punjab Legislative Assembly on the wider ground that in applying the terms of section 298 (1) it is necessary for the Court to consider the scope and object of the Act which is impugned, so as to determine the ground upon which such Act is based If the only basis of the Act is discrimination on one or more of the grounds specified in section 298 (1), then the Act is bad; but if the true basis of the Act is something different, the Act is not invalidated because one of its effects may be to invoke such discrimination In my opinion, in the present case the true object of the impugned Act is to avoid a method of evading the principal Act, which itself is unobjectionable, and although some of the rights avoided by the Act may be vested in persons whose only disqualification is lack of a particular descent, such lack of descent is not the only, or even the primary, ground on which the rights are avoided"

In accordance with the opinion of the majority of the Court, the decree of the High Court was set aside, and the case sent back to the High Court with a direction that proper issues were to be framed in the light of the observations in the majority judgment, and the case remitted to the Trial Court for further trial and decision.

Their Lordships desire to point out the limited nature of the issue in this appeal. In the first place, no question of the validity of the principal Act arises; neither of the two issues taken raises the question, no question of its validity was suggested by the respondent No. 1 before the Board, and the appellant would clearly be concerned to defend its validity The amendment of section 298 of the Act of 1935 by the Act of 1942, and the view of the impugned Act taken by their Lordships, and the concession by the respondent No. 1 of its validity as regards future *benami* transactions, are not encouraging for any attack on the validity of the principal Act In the second place, Mr Pritt, for the appellant, sought to rest some argument on section 23 of the Indian Contract Act, 1872, and in particular illustration (1) thereof and on sections 84 and 96 of the Indian Trusts Act, 1882, in order to suggest that the effect of the *benami* mortgage in the present case was to defeat the provisions of the principal Act, but in the opinion of their Lordships that question does not arise in the present suit, and will not be precluded by any decision on the validity of the impugned Act, which, by its terms, assumes that the *benami* transaction has taken effect. In any event, such an issue cannot be decided in the absence of Gopal Das, the beneficial mortgagee

Turning then to sub-section (1) of section 298 of the Act of 1935, it was not disputed before the Board that a personal right is thereby conferred on every subject of His Majesty domiciled in India, and, in the opinion of their Lordships, the general legislative powers conferred respectively on the Federal Legislature and the Provincial Legislature by sub-section (1) of section 99, are subject *inter alia,* to the provisios of section 298 Beaumont, J, holds that in applying the terms of sub-section (1) of section 298 it is necessary for the Court to consider the scope and object of the Act which is impugned, so as to determine the ground upon which such Act is based. Their Lordships are unable to accept this as the correct test In their view, it is not a question of whether the impugned Act is based only on one or more of the grounds specified in section 298 (1), but whether its operation may result in a prohibition only on these grounds The proper test as to whether there is a contravention of the sub-section is to ascertain the reaction of the impugned Act on the personal right conferred by the sub-section, and, while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal right, the object of the Act, however laudable, will

not obviate the prohibition of sub-section (1) In marked contrast to this, sub-section (2) does take into consideration the object of the impugned Act, despite the contravention of the personal right conferred by sub-section (1) On the question whether the impugned Act does contravene sub-section (1), Mr Pritt, for the appellant, conceded that membership of a tribe was, generally, a question of descent, and, therefore, the question may be stated as " whether the impugned Act prohibits any subject of His Majesty domiciled in India 'on the grounds only . . . . of descent' from acquiring, holding or disposing of property in British India." Three points arise on the question so stated, the first one being whether the provisions of the impugned Act involve a prohibition within the meaning of sub-section (1), in the opinion of their Lordships, there can be no doubt that the avoidance of the *benami* transaction and the recovery of possession by the alienor, which are enacted by the impugned Act for the first time, involve such a prohibition The second—and most important point—is whether such prohibition is only on grounds of descent. In view of the opinion already expressed by their Lordships, it will be enough to show that such will be the result in some of the cases affected by the impugned Act, and it is clear, for example, that if the beneficial vendee or mortgagee either ordinarily resides or holds land in the district, but is not a member of an agricultural tribe, he will be prohibited only on the ground of descent. The third and last point is whether by the provisions of the impugned Act, such a person can be said to be prohibited " from acquiring, holding or disposing of property " within the meaning of sub-section (1) of section 298 ; in the opinion of their Lordships only one answer is possible, *viz*., that he is so prohibited.

Their Lordships, accordingly, hold that the provisions of the new section 13-A, enacted by section 5 of the impugned Act, do involve a contravention of sub-section (1) of section 298 of the Act of 1935, and are *ultra vires* the Provincial Legislature, unless they can be shown to be authorised and protected from such a result by sub-section (2) (*a*) of section 298. As already stated, it is not now disputed by respondent No. 1 that, as regards future transactions, the impugned Act is so authorised and protected, and the only question remaining is whether sub-section (2) (*a*) authorises and protects the opening up and avoidance of *benami* transactions which were in existence at the date of the impugned Act In the opinion of their Lordships, sub-section (2) (*a*) only excepts from the operation of sub-section (1) a prohibition of future action, for the reason expressed by Varadachariar, J, that the word " prohibit " can only mean the forbidding of a transaction, and such a direction is appropriate only in respect of transactions to take place subsequently to the date of the direction, and cannot include an attempt to reopen or set aside transactions already completed, or to vacate titles already acquired Their Lordships, therefore, agree with the High Court and the majority of the Federal Court that the benefit of sub-section (2) (*a*) cannot be claimed for the impugned Act so far as it purports to operate retrospectively.

It follows in the opinion of their Lordships, that the impugned Act, so far as retrospective, was beyond the legislative powers of the Provincial Legislature, and, if the retrospective element were not severable from the rest of the provisions, it is established beyond controversy that the whole Act would have to be declared *ultra vires* and void But, happily, the retrospective element in the impugned Act is easily severable, and by the deletion of the words " either before or " from the early part of sub-section (1) of the new section 13-A, enacted by section 5 of the impugned Act, the rest of the provisions of the impugned Act may be left to operate validly.

The majority of the Federal Court appear to have contemplated another form of severability, *viz*, by a classification of the particular cases on which the impugned Act may happen to operate, involving an enquiry into the circumstances of each individual case There are no words in the Act capable of being so construed and such a course would in effect involve an amendment of the Act by the Court, a course which is beyond the competency of the Court, as has long been well-established. Their Lordships are therefore of opinion that the course adopted

by the majority of the Federal Court, and embodied in the order is not warranted, and must be set aside.

The result is that the impugned Act being *ultra vires* and void in so far as it purports to operate retrospectively, it cannot affect the position of respondent No 1 under the mortgage in suit, but the decision of the present suit will not affect or prejudice any question that may arise as to action by the Deputy Commissioner under section 9 of the principal Act, and the relief sought by respondent No. 1 must be adjusted so as to confine it within the limits of the present suit as explained in the course of this judgment.

It follows that in substance the appellants have failed in this appeal but a difficulty arises owing to the order made by the Federal Court remitting the action to be re-heard against which respondent No. 1 did not cross-appeal. Accordingly their Lordships are of opinion that the appeal should be allowed, that the order of the Federal Court, except so far as it sets aside the decree of the High Court and relates to costs, should be set aside, and that it should be declared that the impugned Act, in so far as it purports to operate retrospectively, is *ultra vires* of the Provincial Legislature, and that a permanent injunction should be granted restraining the appellant and respondents Nos 2 and 3 from taking proceedings under the impugned Act. Their Lordships will humbly advise His Majesty accordingly. In the circumstances the appellant will pay respondent No. 1's costs of this appeal.

Solicitors for Appellant : *The Solicitor, India Office.*

Solicitors for Respondent No. 1 *Linklaters and Baines*

H J.U./V S *Appeal allowed.*

[THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT —SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLAH KHAN, JJ.

Civil Appeal No. IV of 1945.

Kothapu Subbi Reddi .. *Appellant**

v.

Sanepalli Chenna Reddi .. *Respondent.*

INTERVENERS : (1) The Governor-General in Council,
(2) The Advocate-General of Madras.

Civil Appeal No. VIII of 1945.

Raja Manuru Venkata Hanumantha Rao and others .. *Appellants**

v.

Mylavarapu Gundayya and others .. *Respondents.*

INTERVENERS (1) The Governor-General in Council,
(2) The Advocate-General of Madras.

Ordinance (XI of 1945), *section* 2 (*a*)—*Validity of the Ordinance—Effect of section* 2 (*a*).

Ordinance XI of 1945 is valid

The effect of section 2 (*a*) of the Ordinance is that while the Ordinance remains in force, the provisions of the Madras Agriculturists' Relief Act relating to debts arising out of promissory notes must be treated as valid and operative

N. Rajagopala Aiyangar, Advocate, Federal Court, instructed by *Ganpat Rai*, Agent, for Appellant

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*C. A. Nos. 4 and 8 of 1945. 27th March, 1946.

Respondent not represented.

Sir Noshirwan Engineer, Advocate-General of India (*Mohammad Sadiq*, Advocate, Federal Court, with him) instructed by *K. Y. Bhandarkar*, Agent, for Intervener No. 1

K. Rajah Aiyar, Advocate-General of Madras (*D. Narasaraju*, Advocate, Federal Court, with him) instructed by *S. K. Achariar*, Agent, for Intervener No 2—*In Civil Appeal No IV of* 1945.

N Rajagopala Aiyangar, Advocate, Federal Court, instructed by *Ganpat Rai*, Agent, for Appellant.

B. Banerji, Advocate, Federal Court, instructed by *V. B. V. Chari*, Agent, for Respondents.

Sir Noshirwan Engineer, Advocate-General of India (*Mohammad Sadiq*, Advocate, Federal Court, with him) instructed by *K. Y. Bhandarkar*, Agent, for Intervener No. 1.

K. Rajah Aiyar, Advocate-General of Madras (*D Narasaraju*, Advocate, Federal Court, with him) instructed by *S. K. Achariar*, Agent, for Intervener No. 2—*In Civil Appeal No. VIII of* 1945.

The Judgment of the Court was delivered by

The Chief Justice—These two appeals may be disposed of together. They arise out of suits instituted for the recovery of principal and interest on the basis of promissory notes. The defendants in each suit claimed relief in accordance with the provisions of the Madras Agriculturists' Relief Act (IV of 1938).

This Court held in *Bank of Commerce, Ltd.* v *Kunja Behari Kar and others*[1], that the provisions of the Bengal Money-lenders Act (X of 1940), so far as they affected debts due on promissory notes, were *ultra vires* the Provincial Legislature Following this judgment a Full Bench of the Madras High Court in *Kompalli Somayajulu* v. *Akella Subbarayadu*[2] held that the corresponding provisions of the Madras Agriculturists' Relief Act were *ultra vires* the Madras Legislature Consequently when these suits came up before the Madras High Court on appeal in March 1945, that Court disallowed the claim of the defendants to relief under that Act and decreed the suits but in each case granted a certificate under section 205 of the Constitution Act. The defendants have appealed to this Court

On the 5th May, 1945, the Governor-General promulgated Ordinance XI of 1945, section 2 (*a*) of which provides in effect, so far as the present appeals are concerned, that while the Ordinance remains in force the provisions of the Madras Agriculturists' Relief Act shall, in so far as they relate to or affect promissory notes, transactions based on promissory notes or proceedings arising out of such transactions, be deemed to be and always to have been as valid and effectual for all purposes as if they had been, in relation to such matters as aforesaid, enacted by the Central Legislature. A faint suggestion was made by Counsel for the Respondents in Civil Appeal VIII of 1945 that the validity of the Ordinance was open to question on the ground of its retrospective character, but nothing that was urged has served to raise any doubts in our minds on that score. We hold that the Ordinance is valid. The effect of section 2 (*a*) of the Ordinance, the substance of which has been set out above, is that while the Ordinance remains in force, the provisions of the Madras Agriculturists' Relief Act relating to debts arising out of promissory notes must be treated as valid and operative

We allow these appeals, but as there are other questions in each of these cases which require decision by the High Court before a final decree can be passed, we direct that these cases shall be remitted to the High Court for final disposal in accordance with the provisions of the Madras Agriculturists' Relief Act. We make no order as to costs in this Court.

G.R./V.S. ——— *Appeal allowed and case remitted.*

1. (1944) F.C.R. 370 : 6 F.L.J. 221 : (1944) 1 M.L.J. 178.
2. (1945) F.L.J 105 · (1945) 1 M.L.J. 339 : I.L.R. 1945 Mad. 679.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE KUPPUSWAMI AYYAR

D Narayana Singh . . *Petitioner**

v.

Nalluri Seetharatnamma .. *Respondent.*

Criminal Procedure Code (V of 1898), section 253 (1)—Discharge under without examining all the witnesses—Legality.

A Magistrate has no power to pass an order of discharge under section 253 (1) of the Criminal Procedure Code, until he has examined all the witnesses *The Queen* v *Parasurama Naicker*, (1881) I.L R 4 Mad 329, relied upon.

In a case of a complaint under section 420, Indian Penal Code, the Magistrate passed on order of discharge under section 253 (1), Criminal Procedure Code, on the evidence taken by him but without examining the investigating officer and one of the persons cited by the complainant as a witness present at the time of the transaction A revision against that order was dismissed by the Additional District Magistrate with the remark that the Magistrate must have meant that he was discharging the accused under section 253 (2) On a revision to the High Court,

Held, that there was no justification for the Additional District Magistrate thinking that the Magistrate intended to discharge under section 235 (2) when the latter had specifically stated that he discharged the accused under section 253 (1) and proceeding to appreciate the evidence and infer that the Magistrate would have come to the same conclusion even if he had examined the other witnesses The order of discharge must be set aside

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional District Magistrate, Kistna, dated 26th June, 1945, in Cr M P. No 26 of 1945, preferred to revise the order of the Court of the Joint Magistrate of Bezwada in C C No 50 of 1944.

V. T Rangaswami Aiyangar for Petitioner

K S. Jayarama Aiyar and *K Ramaseshayya Chowdary* for Respondent.

The Public Prosecutor (*V L Ethiraj*) on behalf of the Crown

The Court made the following

ORDER —This is a petition by the complainant in C C No 50 of 1944 on the file of the Joint Magistrate of Bezwada. He filed a complaint for cheating against one Sitaratnamma, an offence punishable under section 420, Indian Penal Code. His case was that the accused took jewels from his wife representing that they were required for taking the photograph of a girl who was about to be married and that the jewels were given to her but not returned subsequently though she was requested to return the same A number of witnesses were cited and it was stated that three persons were present at the time of the delivery of the jewels The Magistrate took evidence and also examined a Court witness but passed an order of discharge on the evidence taken by him without examining the investigating officer and one of the persons cited as a witness to prove the delivery of the jewels to the accused. He discussed the evidence and passed an order discharging the accused under section 253 (1), Criminal Procedure Code He definitely states · "I therefore discharge the accused under the provisions of section 253 (1) of the Criminal Procedure Code." The Magistrate had no power to pass an order under section 253 (1) until he has examined all the witnesses. This has been pointed out by this Court in *The Queen* v. *Parasurama Naicker*[1]. When the matter was taken in revision to the Additional District Magistrate, he was of the opinion that the Magistrate committed an error and that what he must have meant was that he was discharging the accused under section 253 (2), and then dismissed the petition. I do not think there is any justification for thinking that the Magistrate intended to discharge under section 235 (2) when he specifically stated that he discharged under section 253 (1). The evidence has been appreciated no doubt on the basis

*Crl R C No. 936 of 1945. (Crl. R P. No. 876 of 1945.) 8th March, 1946

1. (1881) I.L.R. 4 Mad 329.

that all the evidence was over. We cannot say what conclusions the Magistrate would have come to if he had also examined the other witness to prove the delivery of the jewels. As a matter of fact, the accused's case was that the jewels were not received by her. In these circumstances I do not think the Additional District Magistrate was justified in treating the order as one passed under section 253 (2) and proceeded to appreciate the evidence and infer that the Magistrate would have come to the same conclusion even if he had examined the other witness. I therefore set aside the order of discharge and remand the case to the Joint Magistrate of Bezwada for proceeding with the case after examining the two other witnesses who have not been examined, namely, the investigating officer and the other witness who is to prove the delivery of the jewels to the accused.

V S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

A. Perayya ... *Petitioner.**

Madras Gaming Act (III of 1930), sections 5 and 6—Search warrant issued under—Contents—Presumption of validity—Materials justifying issue of warrant not stated in the warrant—If renders it invalid.

A Magistrate should be presumed to know law and also must be presumed to know what the requirements are before he could issue a search warrant under section 5 of the Madras Gaming Act. Section 5 does not state that the Magistrate should record what the materials were on which he was asked to issue the warrant or whether he believed them to be true or not. Where a warrant purports to be issued under section 5 it has to be presumed that the Magistrate would not have issued it under that section unless he had been satisfied on the information supplied to him that it was necessary to issue the warrant. If these presumptions are drawn, then the warrant cannot be said to be invalid merely because of the fact that what the information was on which he was asked to issue the warrant was not stated. If the warrant is validly issued, then the presumption naturally follows under section 6 of the Gaming Act that the place in question was used as a common gaming house and that persons found therein were there present for the purpose of gaming and this will be enough to justify a conviction.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional First Class Magistrate of Anantapur dated 26th March, 1945, and passed in Cr. Appeal No. 2 of 1945, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Dharmavaram, dated 18th December, 1944, and passed in Calendar Case No. 390 of 1944.

A. Bhujanga Rao for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The main point in both these revision petitions is whether the search warrant was properly issued. What is stated is that in the warrant it is not stated what the materials were on which the Magistrate came to the conclusion that it was a case in which a warrant should be issued and it is also stated that the Magistrate has not stated therein that he has reason to believe that the place was used as a gaming house.

Two authorities are cited, one for the petitioner and another by the learned Public Prosecutor. The one relied on by the petitioner is reported in In re *Thambi Ayyangar and others*[1]. In that case, there was no other evidence except the presumption sought to be raised under section 6 of the Gaming Act. The other to the contra is a decision of Burn, J., in *Naranappayya* v. *Emperor*[2]. It is not necessary to refer to either of these decisions. In this case the warrant purports to be issued by a second class Magistrate under section 5 of the Gaming Act. A Magistrate should be presumed to know law and also must be presumed to have known what the requirements are before he could issue the warrant. Section 5 does not state

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*Crl. R.C. Nos. 574 and 575 of 1945. 7th January, 1946.
(Crl. R.P. Nos. 533 and 534 of 1945.)

1. (1945) 2 M.L.J. 537.
2. (1938) 1 M.L.J. 509.

that the Magistrate should record what the materials were on which he was asked to issue the warrant or whether he believed them to be true or not. As already stated, in this case the warrant purports to be issued under section 5 The Magistrate would not have issued the warrant under this section unless he had been satisfied on the information supplied to him that it was necessary to issue the warrant. If these presumptions are drawn, then the warrant cannot be said to be invalid merely because of the fact that what the information was on which he was asked to issue the warrant was not stated If the warrant is therefore validly issued, then the presumption naturally follows under section 6 of the Gaming Act that the place was used as a common gaming house and that the persons found therein were there present for the purpose of gaming and this will be enough to justify the convictions

It is next urged that the evidence in one case has also been used in the other. The two cases were tried together and a common judgment has been written. It would have been better if the magistrate had referred only to the evidence in each case and written separate judgments. But then it is only an irregularity. The presumption that he could draw under section 6 is the main material on which the judgment has been based Further, there was also the evidence of the Circle Inspector and he had stated what the materials were He has also stated that he believed the information to be true In these circumstances I will not be justified in failing to draw the presumption under section 6 and if this drawn then these petitions will have to be dismissed I do not think this is a case in which I will be justified in interfering with the sentence

The petitions are accordingly dismissed

V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE KUPPUSWAMI AYYAR

Sala Mahammad *Petitioner.**

*Madras Rationing Order, clause 4—"Rationed article"—Interpretation—Wholesale dealer with licence to sell paddy selling paddy to persons living outside rationed area—If an offence—*Bona fides *of the transaction—Effect on sentence*

The scheme of the Madras Rationing Order clearly indicates that it deals only with transactions in respect of rationed articles which are sold and purchased in the rationed area It has reference only to the sale or purchase of the articles and not the user Hence it cannot be contended that an article will be a "rationed article" only if it is to be sold for use in a rationed area, and that if it is to be used or dealt with in a place other than the rationed area, it will not be a "rationed article' The participle "rationed" must be understood as referring to the article and not to the use to which it is put or the place where it is to be used

Where a wholesale dealer having a licence to sell paddy and rice within a rationed area but who did not have a permit entitling him to sell in that area any rationed article, sells in that area paddy, a rationed article, to persons outside that rationed area, he is guilty of a contravention of clause 4 of the Madras Rationing Order as he is not an "authorised wholesale distributor" as defined in the order and as such he could not sell or offer or attempt to sell to any person any rationed article

Where the sale and purchase are *bona fide* there is no necessity to give an exemplary punishment.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Session, North Malabar division, dated 3rd February, 1945, in C.A. No 47 of 1944 (C.C. No 120 of 1944, Joint Magistrate's Court, Tellicherry)

V Rajagopalachari for Petitioner

The Public Prosecutor (*V L Ethiraj*) on behalf of the Crown

The Court made the following

ORDER —The petitioner has been sentenced to pay a fine of Rs 10,000 for having contravened the provisions of the Madras Rationing Order, clause 4, read with section 81 (4) of the Defence of India Rules He is a wholesale dealer in rice and paddy at Tellicherry, and the contravention consisted in selling paddy to two

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*Crl R C No 375 of 1945 (Crl.R P. No. 350 of 1945) 8th February, 1946.

persons in Kallai, outside the Municipal limits of Tellicherry, and he is said to have contravened by the sale, the provisions of clause 4 of the Madras Rationing Order, which runs thus :

"No person other than an authorised wholesale distributor, an authorised retail distributor or an authorised establishment shall, on or after the rationing date, supply or offer or attempt to supply to any person any rationed article "

In this case, it is not disputed that he is a person other than " an authorised wholesale distributor, an authorised retail distributor, or an authorised establishment " No dout, he has a licence to sell paddy and rice, but then the expression " authorised wholesale distributor " is defined in the order as a person with an authorisation in respect of a " rationed article ". " Rationed article " is defined to be "any article which the Provincial Government may by notification in the official Gazette in respect of any rationed area specify in this behalf." Rice and paddy, that were sold, are rationed articles in Tellicherry town, where the sale is said to have been effected. But the petitioner has not obtained the permit entitling him to sell in the area any rationed article. Therefore he is not an " authorised wholesale distributor " as defined in the order. Such a person shall not sell or offer or attempt to sell to any person any rationed article. The expression used in the order is " any person " and not merely " a person living in the rationed area ". So the petitioner is a person other than an " authorised wholesale distributor ", as defined in the order, and he has sold to a person paddy, which is admittedly a rationed article.

But what is urged before me is that an article will be a " rationed article " only if it is to be sold for use in a rationed area, and, if it is to be used or dealt with in a place other than the rationed area, it will not be a " rationed article " I do not think that I will be justified in accepting this contention, for, then we would have had, instead of the expression " any person ", this description, namely, " a person living in the rationed area requiring the article in the rationed area " which is not there Therefore, the participle " rationed " must be understood as referring to the article and not to the use to which it is put or the place where it is to be used. The scheme of the Rationing Order clearly indicates that it deals only with transactions in respect of rationed articles which are sold and purchased in the area. Therefore, it has reference only to the sale or purchase of the articles and not the user. If this is so understood, the petitioner is guilty

As regards the sentence, the petitioner has been sentenced to pay a fine of Rs. 10,000. I should think it is excessive It is not necessary to give an exemplary punishment for this reason. This firm has been supplying articles—even rationed articles—not only to persons in Tellicherry but also to persons living outside In this case, the persons, to whom the paddy was supplied, are living outside the rationed area, and they are persons who have been purchasing for use outside the area. Consequently, the purchase was made *bona fide* and in these circumstances the fine of Rs 10,000 is excessive and I accordingly reduce it to Rs 500

V S. ——— *Conviction upheld, but sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE RAJAMANNAR.

R. Thirumalai Naicker by his duly constituted agent V S Govindaraja Naicker . *Plaintiff**

v.

Ethirajammah and others . *Defendants*

Hindu Law—Marriage—Form—Custom—"Nadu veetu thali "*—If a valid form—Presumption of validity from* factum *of marriage*

Hindu Law—Inheritance—Sudras—Son born of widow continuously kept as concubine—Right to inherit.

Where a ceremony of marriage with a widow which consisted in tying what is called a *Nadu veetu thali* according to an alleged custom among Nayakars is proved to have been gone through, the general presumption in favour of a valid marriage can be drawn when there is no evidence to establish that such form is invalid

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* C S No. 162 of 1945. 7th March, 1946.

Even if a valid marriage is not established the facts will be sufficient to constitute a permanently kept concubinage which will entitle the children to inherit

The requirement that the "dasi" should be an unmarried woman does not mean that she should not have been married to another before Accordingly an illegitimate son born to a widow kept as a continuous concubine is entitled to inherit

Authorities discussed.

G. Ramakrishna Aiyar for Plaintiff

V. N Srinivasa Rao and *G R Krishna Rao* for Defendants.

The Court delivered the following

JUDGMENT —This suit relates to the succession to the properties of one Thiruvengada Nayakar who died on the 21st March, 1945 The plaintiff claims as his divided brother on the ground that the deceased did not leave any nearer heir like widow or child The first defendant claims to be the second wife of the deceased and defendants 2 and 3 claim to be the son and the daughter respectively of the deceased by the first defendant. The defendants put forward an alternative case that even if the first defendant was not the lawfully married wife of the deceased, she was in any event his permanently kept concubine and the second defendant was the son born to the deceased by the first defendant and therefore as an illegitimate son he would be entitled to succeed to his putative father, It is obvious that the plaintiff's suit must fail if either case of the defendants is established.

Issues 1 to 4 raise questions which are really necessary for the disposal of the suit. Issues 1 and 2 relate to the plea of a lawful marriage set up by the defendants while issue 3 relates to the case of exclusive concubinage set up by them.

The undisputed facts are as follows. Sometime in 1922 there was a partition between the deceased Thiruvengada Nayakar and his two brothers, and the properties now in suit fell to the share of Thiruvengada. The deceased was married to one Saraswathi and she died in December, 1933. The first defendant was herself married to one Kolandavelu who died in March, 1935. It is common ground that the first defendant and her deceased husband Kolandavelu Naicker were tenants in the house belonging to the deceased Thiruvengada Nayakar, namely, 1-A, Vathiar Kanda Pillai Street, Choolai, Madras, and the deceased was himself living in another part of the same house Though the actual date from which the tenancy started is not known, it appears from the evidence that they were tenants even prior to the death of Thiruvengada's first wife. It is also admitted by the plaintiff that even subsequent to the death of her husband Kolandavelu Nayakar, the first defendant continued to live in the same house in which Thiruvengada lived, right up to his death

The first defendant's case is that, within two months after the death of her husband Kolandavelu Nayakar, she married Thiruvengada Nayakar and since the date of the marriage lived with him as his wife and bore him four children of whom two, namely, defendants 2 and 3 survive According to the first defendant, the ceremony of marriage which was gone through was not presumably the usual marriage ceremony, but a ceremony which consisted in tying what is called *Nadu veetu thali* according to a custom among Nayakars. The plaintiff firstly denies the factum of marriage and further pleads that the alleged ceremony, even if it took place, is no form of legal marriage. In paragraph 11 of the plaint a further contention is put forward, namely, that the first defendant does not belong to a community, in which re-marriage is permitted by custom and therefore she is not the legally married wife of Thiruvengada Nayakar. This contention is obviously untenable because, after the Hindu Widows' Re-marriage Act, it is not necessary to resort to custom to validate the re-marriage of a Hindu widow. It is not pleaded that there is a custom which invalidates a marriage permitted by Statute even assuming such a custom can ever be upheld by a Court. This contention can therefore be disregarded *in limine*

Two questions therefore arise—a question of fact and a question of law. On the question of fact the evidence is all one way though, it must be admitted, the

evidence is very meagre. The first defendant herself has given evidence of the ceremony that was gone through for the marriage Her second witness, one Ramanuja Naicker who claims to have been a tenant in the house of Thiruvengada Nayakar for several years, says that he was present on the occasion of her marriage. He describes the ceremony thus · In the centre of the court-yard a lamp was lit, a purohit officiated and a *thali* was tied

Though the evidence of the actual ceremony of marriage is confined to the testimony of these two witnesses there is abundant evidence on record which unmistakably establishes that the deceased Thiruvengada Nayakar and the first defendant were living together as man and wife till the date of Thiruvengada Nayakar's death. On this point, besides the evidence of Ramanuja Naicker there is the evidence of D W. 3, admittedly a purohit of Thiruvengada Nayakar as well as the plaintiff besides several other Nayakar families I have no reason whatever to doubt his testimony He says that he knows of the birth of the third defendant and that he officiated at the *punyavachanam* ceremony on the 11th day after the birth and that on that day the deceased Thiruvengada Nayakar and the first defendant sat together as husband and wife and went through the ceremony Kuppuswami, D. W. 4, is the son of the first defendant by Kulandavelu Nayakar. After his father's death, he continued to live with his mother in the same house He deposes to the fact that his mother was living with the deceased Thiruvengada Nayakar as his wife. He also speaks to the birth of the second and the third defendants. D. W 5, Thangavelu Nayakar has been a tenant of the same house in which Thiruvengada Nayakar and the first defendant were living from 1938. He knows of the birth of the third defendant and he speaks to the fact that Thiruvengada Nayakar and the first defendant were living together as man and wife

There is also evidence that the funeral and obsequial ceremonies of Thiruvengada Nayakar were performed by one Kannappa, the son of a paternal uncle of Thiruvengada Nayakar officiating for the second defendant. The plaintiff would have it that he lit the funeral pyre and performed the 16th day ceremony. Besides giving evidence himself, he has examined one Vinayaka Nayakar for this part of his case ; but I do not believe their evidence. P W 2, a garrulous old man, was inclined to be more loyal than the King himself and extremely anxious to say anything that is likely to be of use to the plaintiff He would even say that the plaintiff carried the fire pot though the plaintiff himself denied having carried it. P W. 2's evidence with regard to the performance of the 16th day ceremony is also not worthy of acceptance It is very doubtful if he was ever present at all at the ceremony. On the other hand, I have no reason to doubt the veracity of the purohit D W. 3 when he says that the 16th day ceremony was performed, as it ought to be performed, at the tank by the second defendant with Kannappa deputising for him as the second defendant was a young boy.

I must confess that there is not enough evidence before me to find that the form of marriage described by D Ws 1 and 2 is recognised by a custom among the Nayakars to be a valid form of marriage. No doubt I refuse to attach any importance to the evidence of P W 2, who asserted that he had never even heard the term " *Veettu thali* " at any time in all his eighty years , but I doubt if the evidence of Ramanuja Nayakar alone is enough to enable a Court to come to a definite finding as to the existence of a custom. Though neither party asked the purohit any question on this point, I asked him whether he had officiated at or knew anything about this form of marriage. He said that he had not himself officiated at any such marriage but that he had heard of such a form, and that it was not sastraic but was customary. Ramanuja Nayakar no doubt asserted that a wife married according to this form of " *Nadu veetu thali* " was also considered a legally married wife by the community. In this state of the evidence I am forced to rest my conclusion not on a definite finding that it has been established before me that this form of marriage is valid, but rather on the general presumption which ought to be drawn in favour of a valid marriage, when the fact of the celebration of some form of marriage is established and it has not been established before me by evidence on behalf of the plaintiff that that form is invalid.

Even assuming that the evidence in this case falls short of establishing that there has been a valid marriage between the deceased Thiruvengada Nayakar and the first defendant, there can be no doubt whatever that the evidence is certainly sufficient to support a finding that the first defendant was the permanently kept concubine of the deceased Thiruvengada Nayakar That the first defendant remained with the same Thiruvengada Nayakar for several years admittedly till the date of his death is admitted by the plaintiff It was also admitted by the plaintiff that defendants 2 and 3 were born to the first defendant in the house in which Thiruvengada Nayakar and the first defendant were living. When the first defendant was in the witness box not a question was asked of her suggesting that other men had access to her The witnesses examined on behalf of the defendants are unanimous that the deceased Thiruvengada Nayakar treated the first defendant as his wife and defendants 2 and 3 as his children On this point there is evidence of the utmost importance and unimpeachable character Ex D-1 is an extract from the Birth Register kept of the 19th division by the Corporation of Madras. It shows that on the 16th December, 1936, a male child was born at No 1, Vathiar Kanda Pillai Street The father is named there as Thiruvengada Nayakar and the mother as Ethirajamma The informant was one Ramanuja Nayakar living in the same house He is D W 2, and he says that those columns were filled up according to the instructions of the deceased Thiruvengada Nayakar Ex D-2 is the triplicate given to the informant when the report of the birth of the third defendant was made by Kuppuswami, D W 4 In this also the father is entered as Thiruvengada Nayakar and the mother as Ethirajamma These two documents taken with the evidence of Ramanuja Nayakar, D W 2, the purohit D W 3, and Thangavelu Nayakar D W 5, establish the fact that the second and third defendants were considered and treated by Thiruvengada Nayakar as his children I have therefore no hesitation in finding on issue 3 that the first defendant was the exclusively kept concubine of Thiruvengada Nayakar and that defendants 2 and 3 are the illegitimate children of Thiruvengada Nayakar by the first defendant

Mr Ramakrishna Aiyar, the learned advocate for the plaintiff, has raised an interesting question of law that the second defendant cannot inherit to Thiruvengada Nayakar because he was born of an intercourse between Thiruvengada Nayakar with the first defendant, a woman who had been married though at the time of the birth of the second defendant and at the time of his conception the husband of the first defendant was not alive. In other words, he says, even though a widow can be kept permanently as concubine, the illegitimate son born to her would not be capable of inheriting to the putative father as a dasi putra No doubt there is some authority in his favour In *Annayyan* v *Chinnan*[1], which was a case similar to the present, Sir Arnold White, C J, and Benson, J, held that an illegitimate son of a Sudra widow has no right of inheritance, because they found that re-marriage of widows was forbidden among Sudras of the cast to which the parties belonged, and the son, being the offspring of a connection forbidden by customary law, had no right of inheritance to the property They also referred to the rule that the illegitimate son of a Sudra who can inherit to him, should be the son by " an unmarried Sudra woman " according to the texts of the Hindu Law in Dayabagha, Chapter 9. The learned Judges, however, did not rest the decision on this ground This decision was followed by another Bench of this Court, Sundara Aiyar and Ayling, JJ., in *Padala Krishna Rao* v *Padala Kumarajamma*[2] The facts in that case also were similar to the facts of the present case and it was held that, in order that an illegitimate son may be entitled to succeed his father, he must have been born of a woman who was never married to anyone before she came under the keeping of the person whose son the claimant was

The reasoning of the learned Judges in *Annayyan* v *Chinnan*[1], must be considered in my opinion, to have been overruled by the decision of the Full Bench in *Soundara-*

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1. (1909) 20 M.L J. 355 . I.L R. 33 Mad. 366. 2. (1912) 15 I C 340

rajan v. *Arunachalam Chetti*[1]. It was there held that there is no condition that a marriage could have taken place between the putative father and the mother who was the concubine according to the custom of the caste to which the mother belonged. That case no doubt related to the claim of an illegitimate son of a Sudra by a dancing woman who was by profession a prostitute But, in my opinion, the *ratio decidendi* of that case must be taken to also govern the case of a widow being kept as a permanent mistress At page 150, Sir John Wallis, C J., says

"To satisfy the texts it must be shown that the mother is a *dasi*, not that she is qualified to become a wife As regards her being unmarried woman the Dayagbhaga no doubt mentions this, but this text has been interpreted as meaning not married to father of the child—*Venkatachala Chetti* v *Parvatham*[2], *Karuppannan Chetti* v *Bulokam Chetti*[3], *Annayyan* v. *Chinnan*[4], and *Padala Krishna Rao* v *Padala Kumarajamma*[5], and this is how the passage was understood by Medatithi".

At page 154, Sadasiva Aiyar, J , clearly says that he is not prepared to follow either *Annayyan* v. *Chinnan*[4], or *Padala Krishna Rao* v. *Padala Kumarajamma*[5]. Dealing with this question that the mother must have been unmarried, the learned Judge observed as follows :

"Mr. B Sitarama Rao argued for imposing still another restriction that the mother must have been a virgin when she became the permanent concubine of the plaintiff's father. There is nothing in the Hindu Law texts to support that contention "

The fundamental basis of the decision in *Annayyan* v. *Chinnan*[4], namely, that a legal connection should be possible between the putative father and the mother before the male offspring of such a connection could inherit was completely destroyed by the decision of this Full Bench. Again at page 154, Sadasiva Aiyar, J , observes :

"When the legislature itself treats the marriage of all widows (including a Brahmin widow) as lawful it seems to me rather difficult to hold that the permanent connection between a Sudra widow and a Sudra male is equivalent to an incestuous and adulterous connection because in the sub-caste of the lady, remarriage is not approved of by custom and to hold in consequence that the son born of such a connection is not entitled to a share."

In *Subramania Aiyar* v. *Rathnavelu Chetti*[6], actual decision by the Full Bench was not concerned with the question which falls to be considered here ; but in the order of reference made by Sadasiva Aiyar, J., with which Napier, J., concurred, this question had to be incidentally considered. In that case, as in this, the illegitimate son was the offspring of a widow The following observations of Sadasiva Aiyar, J , at page 47 are apposite. Referring to *Annayyan* v. *Chinnan*[4], he observes :

"There the learned Judges, notwithstanding that remarriage of widow is sanctioned by Statute Law, held that if re-marriage is unlawful by custom, concubinage with such a widow is prohibited connection They also held that 'unmarried' does not mean 'not married to the putative father' but not married to anybody before I respectfully dissent from that decision . . . . The ex-expression in the Texts translated loosely as 'unmarried woman' merely means 'a woman not married to the father of the person whose rights of inheritance were under consideration.'"

I may mention that the High Court of Bombay has consistently taken the view that the illegitimate son of a widow kept as a permanent mistress would be entitled to inherit to his putative father—*Rahi* v *Govind Valad Teja*[7], and *Gangabai Peerappa* v. *Bandu*[8].

It is important to remember that this condition of the mother being an unmarried Sudra is not to be found in any of the southern commentaries of Yagnavalkya, is not to be found in Mitakshara, in fact it is to be found only in Dayabhaga and in some of the commentaries on the Dayabhaga The original Sanskrit word 'aparineetha', to my mind, cannot refer to the status of the woman independent of the person with reference to whom she is being described as a dasi 'Parinaya,' the marriage relation, is obviously intended to refer to the person the rights of whose offspring are the subject-matter of the dicussion ; otherwise, one would expect a positive term like "kanya" if it was intended to refer to a maiden in her virgin state.

F 1 (1915) 29 M L J 793 I L R 39 Mad 136 (F B)
2 (1875) 8 M H C R 134
3 (1899) I L R 23 Mad 16
4 (1909) 20 M L J 355 : I L R. 33 Mad. 366.
5 (1912) 15 I C 340
6 (1917) 33 M L J 224 I L R 41 Mad 44 (F B)
7 (1875) I L R 1 Bom 97.
8 (1915) I L.R 40 Bom 369.

On a consideration of the authorities referred to I am clearly of opinion that the following statement of the law in Mayne's Hindu Law, 10th edition, at page 648 represents the correct view :

> "The requirement that the 'dasi' should be unmarried woman does not, it has been held, mean that she should not have been married to another before. Accordingly an illegitimate son born to a widow or to any prostitute kept as a continuous concubine is entitled to inherit"

My finding on this issue is that, either defendants 1 and 2 or the second defendant would exclude the plaintiff, that is to say if the marriage is valid marriage as I have held, the first defendant and the second defendant would be entitled to succeed to the properties of Thiruvengada Nayakar, if however the marriage were to be held invalid, then, according to my finding on issue 3, the second defendant would be an illegitimate son of Thiruvengada Nayakar, entitled to succeed to him The plaintiff would in any event fail

No finding is necessary on issue 5 as the plaintiff has failed to establish his title.

In the result the suit is dismissed with costs.

K S *Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE KUPPUSWAMI AYYAR.

Jaldu Manikyala Rao and others .. *Petitioners**

v.

Nimmagadda Venkatappayya . *Respondent.*

Criminal Procedure Code (V of 1898), section 145—Parties to proceedings under—If can be compelled to appear in Court in person or execute bonds for such appearance.

Parties in proceedings under section 145, Criminal Procedure Code cannot be compelled to appear in Court or execute bonds for appearance The parties can appear by pleader If they do not appear and let in evidence, then the case will be disposed of *ex parte* after taking the evidence let in by the other side

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate, Masulipatam, dated 2nd October, 1945, in M C No. 9 of 1945.

S Kothandarama Nainar for Petitioners.

P Sivaramakrishnayya and *K. Bhimasankaram* for Respondent.

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER —This is a petition to revise the order of the Additional First Class Magistrate of Masulipatam, dismissing the petition of the petitioners stating that they cannot be compelled to execute bonds for appearance and that they cannot be compelled to appear in Court merely because they happen to be parties to proceedings under section 145 of the Code of Criminal Procedure I do not think the Magistrate was right in saying that he can compel parties in proceedings under section 145 to appear in Court It may be open to him to summon them as witnesses if they are wanted either as Court witnesses or witnesses for the other side But then they will be attending Court as witnesses and not as party. Even under the preliminary order it is stated that the respondents were to appear either in person or by pleader. The Magistrate himself had permitted them to appear by pleader and that order has not been cancelled. The Magistrate therefore was not justified in insisting upon the attendance of these petitioners if they are not willing to appear

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* Cr. R C No 1128 of 1945. 7th March, 1946.
(Cr. R. P No 1044 of 1945).

in Court but are content with appearance by pleader Further if they do not appear and let in evidence, then the case will be disposed of *ex parte* after taking the evidence that may be let in by the other side In these circumstances the order of the Magistrate insisting upon their appearing in person and executing bonds is incorrect and is therefore set aside

K S *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE HORWILL AND MR JUSTICE SHAHAB-UD-DIN

The Public Prosecutor . . *Appellant**

v

Chitikina Subbanna and others .. *Respondents*

Criminal Trial—Practice —Appeal against acquittal—Four accused charged under section 302 read with section 34, Indian Penal Code—Concession by the Public Prosecutor in the trial Court as to absence of common intention against three of the accused—Acquittal of those three of murder—Appeal by Crown against the order of acquittal of the three accused on the charge of murder—Wrong concession in trial Court no bar to interference

Four accused were tried on a charge under section 302 read with section 34, Indian Penal Code and the Public Prosecutor in the trial Court conceded that common intention could not be imputed to three of them The trial Judge, believing the evidence and agreeing with the concession, convicted one of the accused for murder, and the other three for their individual acts but acquitted them on the charge of murder On an appeal by the Crown against such acquittal,

Held, the concession wrongly made by the public prosecutor in the trial Court does not stand in the way of an appeal against acquittal based on that concession being allowed

Public Prosecutor v *Allada Satyam*, 1931 M W N 873, explained and not followed

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the judgment of the Sessions Judge of West Godavari at Ellore in Sessions Case No 9 of 1945 on his file

The Public Prosecutor (*V L Ethiraj*) in person

R Ramalinga Reddi for Respondents

The Judgment of the Court was delivered by

SHAHAB-UD-DIN, J —The respondents who were accused 1, 3 and 4 in Sessions case No 9 of 1945 in the Court of Session, West Godavari, were tried with the second accused on a charge under section 302, Indian Penal Code read with section 34, Indian Penal Code in respect of the murder of one Arupalli Narasimhulu The learned Sessions Judge convicted the second accused of murder and sentenced him to death , and that conviction and sentence were confirmed and his appeal was dismissed by this Court (Referred Trial No 156 and Cr App. No 552 of 1945). The learned Judge held that the respondents were not guilty of murder He convicted the first accused of causing grievous hurt and sentenced him to five years' rigorous imprisonment and the other two accused of ' wrongful confinement ' ; sentence being one year's rigorous imprisonment each They have not appealed but the Public Prosecutor, Madras, has filed this appeal against their acquittal on the charge of murder

The case for the prosecution was that early in the morning of the 26th December, 1944 while the deceased was taking fodder for his cattle to his field, accused 3 and 4 caught hold of him and accused 2 aimed a blow with a tree-tapper's knife at his throat The deceased put up his left arm to ward off the blow and received on it three cuts Accused 1 who also had a tapper's knife cut him on the left arm. The deceased raised an alarm as soon as he ws attacked and P W 2, his brother, who was coming behind him as well as P.W 3 of the neighbouring field who had joined P W 2 on the way came running and tried to intervene, but ran away as the first and second accused threatened to cut them P Ws 4 and 5, who were in the neighbouring fields, also came running and meeting P W. 2 on the way learnt

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* Cr. Appeal No 21 of 1946 1st March, 1946

from him that the four accused were cutting the deceased When they arrived on the scene, they saw the accused running away. They then chased the accused for some distance and then returned to the deceased P.Ws. 6, 7, 9 and 10 also came to the scene of occurrence and to them the deceased Narasimhulu stated that the accused had cut him The deceased was then taken to the hospital at Achanta, three miles from the scene, which he reached at 9 A M There were three injuries on the left arm and one on the right. All of them were incised wounds and one of the injuries on the left arm had cut the brachial artery and vein Apprehending that this injury might prove fatal, P W 1, the doctor, sent for P W. 12, the village headman, who had the dying declaration Ex C recorded in his presence by the karnam P.W. 13. In that statement which is attested by the doctor, Narasimhulu implicated the four accused and described the parts played by them in the attack. He said that the third accused caught hold of him, that the second accused came with a tapper's knife, that then the fourth accused also came and caught hold of him, that on the second accused attempting to cut his throat with the knife he raised his hands to ward off the blow and received the cuts on his left hand Then the first accused came and cut him on his right hand and on his raising an alarm P W 3 and others came, and the accused ran away. Narasimhulu died the same day at 6-30 P M As already stated one of the injuries on the left arm had cut the brachial artery and vein The injury inflicted by the first accused on the right arm had resulted in the fracture of the external condyle of the humerus. The postmortem examination disclosed that death was due to shock and haemorrhage resulting from the injuries

An hour prior to the occurrence, P W. 6, while going to his field that morning saw the four accused together at about 50 yards from the spot where the deceased was attacked , and an hour later he heard the deceased's cry. The accused were not available to the police that day but were arrested in their houses the next day. At about 10 A M on the day of occurrence accused 1 and 2 came to P W 14 the monigar of Achanta (it appears that there are three village officers besides the karnam for this village) and presented a complaint Ex K, alleging that that morning while the four accused were in the tope of the first accused (the first accused is a renter of a toddy shop) the deceased, P W 2 and the others named in that complaint came in a body, that the deceased cut the second accused between the left thumb and forefinger and that P W 2 hit the fourth accused with a stick on his back and the third accused on his leg The others who had come with the deceased and P W 2 attempted to attack the accused with knives and sticks and so the accused ran away There was a minor injury between the left thumb and forefinger of the second accused, which P W 14 noticed P W 17, the investigating officer, also saw it, but it does not appear that the second accused was sent to the doctor. The injury was a trivial one There were no injuries on the other accused

The rest of the evidence relates to the motive for the offence There was enmity between the first accused on the one hand and the deceased and his brothers on the other due to rivalry in bidding at the toddy sales of 1944 Owing to the competition by the deceased, the first accused had to take the lease of the shops for a far higher amount than ususal. P W 15, the President of the Panchayat Board of Achanta, deposed that there were criminal cases in his court between the deceased and some others on the one hand and the first accused on the other It is alleged in Ex K that the deceased, P W 2 and others were breaking the pots tied to the trees of the first accused The third and fourth accused are brothers The first accused is the son of the third accused and the second accused in the son of the fourth accused.

All the accused denied the charge The first accused stated that he had the lease of the toddy shop against the wishes of the kammas of the village and did not give the usual contribution to the temple The kammas, therefore, falsely implicated him He denied having presented Ex K to P W 14 The other accused stated that they had been falsely implicated by the kammas

On this evidence, the Public Prosecutor of West Godavari conceded that in view of the decision of their Lordships of the Privy Council in *Mahbub Shah* v. *The King Emperor*[1], he could not contend that the common intention necessary for the application of section 34, Indian Penal Code could be inferred The learned Sessions Judge who believed the evidence referred to above, agreeing with the Public Prosecutor, took the view that the respondents could be held responsible only for their individual acts and convicted and sentenced them as stated already. He observed,

"There is no proof in this case that the criminal act was done in concert by all the accused pursuant to any pre-arranged plan It follows therefore, that each of the accused can be responsible only for the offence committed by him "

The learned Public Prosecutor, Madras, contends that it is a necessary inference from the facts proved in this case that all the accused acted in concert in pursuance of a pre-arranged plan to kill the deceased and that the fact that the Public Prosecutor in the trial Court made a concession on this point wrongly cannot stand in the way of our considering the question in this appeal The learned Counsel for the respondents relying on the judgment of Reilly, J in *The Public Prosecutor* v *Allada Satyam*[2], argues that in view of the concession made in the trial court, this Court should not interfere even if it considers that the concession was wrongly made. He contends that the concession made by the Public Prosecutor in the lower Court was not wrong, that even if the evidence for the prosecution is accepted as true, it cannot be said that the first accused, though armed with a tapper's knife, had the intention to kill and that in any event such an intention cannot be imputed to the third and fourth accused Finally, referring to the evidence of P W 13 that the Kammas were on bad terms with the first accused, he argues that it is not safe to rely on the evidence adduced by the prosecution as all the occurrence witnesses except P W. 2 are kammas With regard to P W 2, the argument is that he should not be believed as his name does not find a place in the dying declaration. It is said that Ex K relates to a different incident and not to the incident in which the deceased was injured.

Having been through the entire evidence and having considered the above-mentioned decisions, we are of opinion that the contention of the learned Public Prosecutor is well founded and this appeal must be allowed. In *The Public Prosecutor* v. *Allada Satyam*[2], the accused was charged before the Sessions Judge with murder or culpable homicide The Public Prosecutor when summing up the case stated that the offence would not come within the scope of murder and this view was accepted by the learned Judge who convicted the accused under section 304, Indian Penal Code On appeal against the acquittal on the charge of murder, there was a difference of opinion between the learned Judges. Waller, J taking the view that the offence committed was murder and the appeal should be allowed and Pandalai, J. being of the opinion that the Sessions Judge's conclusion was supportable though not on the grounds stated by him The case came before Reilly, J who while agreeing with Waller, J that the facts proved by the prosecution established a case of murder declined to allow the appeal because of the concession made by the Public Prosecutor in the trial Court. He observed that if a Public Prosecutor in a mofussal Sessions Court could withdraw from the prosecution on a serious charge and ask only for a conviction on a minor charge and then another officer representing the Crown could come to this Court and ask for a conviction on the serious charge it would be grossly unfair to the accused as at the end of the trial, his counsel had only to reply to the argument of the Public Prosecutor and at that stage had not to meet the serious charge. If this observation is accepted as correct we should not interfere in this case, but with respect, we are unable to agree with the learned Judge. The concession made in the arguments by the Public Prosecutor in that case, it appears to us, did not amount to his having withdrawn from the prosecution on the charge of murder. Nor do we see any prejudice caused to the accused in

1. (1945) 2 M.L.J. 144 · L.R. 72 I.A 148 (P.C.). 2. (1931) M.W N. 873.

that case. It is no doubt true that his advocate did not have the opportunity of arguing that the offence made out was only culpable homicide not amounting to murder; but that was hardly necessary as the trial Judge himself was of that opinion, and when the appeal against the acquittal was heard, the accused's advocate, had the opportunity to argue that point. It would have been a different matter if the concession had been made at the commencement of the trial or before the evidence was adduced by the accused A concession wrongly made on behalf of the accused cannot stand in the way of the appellate Court setting aside a conviction based on such a concession; similarly a concession wrongly made by the Public Prosecutor should not, in our opinion, stand in the way of an appeal against an acquittal based on that concession being allowed It has been observed by their Lordships of the Privy Council in *Sheo Swarup* v *King Emperor*[1], that there is no distinction as regards the powers of the High Court in dealing with an appeal between an appeal from an order of acquittal and an appeal from a conviction.

As regards the question of common intention both the Public Prosecutor and the learned Sessions Judge of West Godavari have failed to notice that the facts in *Mahbub Shah* v. *The King Emperor*[2], were entirely different from those of the present case There, two of the complainant's party were shot at by two of the accused who came on the scene armed with guns to rescue the third accused One of the men shot at fell down dead while the other was injured All the three were charged with the offence of murder but only two were tried, as the person who actually fired the shot that killed the deceased was absconding The High Court of Lahore acquitted the accused for whose rescue the other two accused who fired the shots came on the scene, but confirmed the conviction of the accused who did not fire at the deceased Their Lordships of the Privy Council set aside that conviction observing that common intention within the meaning of section 34, Indian Penal Code implied a pre-arranged plan and that to convict the accused before them it should be found that he fired pursuant to the pre-arranged plan to kill the deceased. Their Lordships further observed that in most cases the pre-arranged plan has to be inferred from the act or conduct of the accused or other relevant circumstances of the case. In the circumstances of that case, their Lordships were of the opinion that the evidence fell short of showing that the appellant and the absconding accused entered into a pre-concerted plan for bringing about the murder of the deceased In their Lordships' opinion, the only inference justified by the circumstances of that case was that the appellant and the absconding accused shared the intention to rescue the other accused. But in the case before us we feel no difficulty in inferring from the evidence that the accused entered into a pre-arranged plan to kill the deceased The mode of attack itself indicates that the four accused were animated with the intention of killing the deceased. The first and second accused were armed with tapper's knives and the second accused aimed first at the throat of the deceased The third and fourth accused continued to hold the deceased while the first and second accused cut him and this attack continued even after P Ws 2 and 3 attempted to intervene. Then there is the evidence of P. W. 6 that the four accused were lying in wait prior to the occurrence. It does not appear that the learned Judge considered this evidence We therefore consider that if the evidence for the prosecution can be accepted, it clearly follows that all the accused acted with the common intention to kill the deceased The fact that the third and fourth accused were not armed does not make any difference.

It now remains to consider the contention that the evidence should not have been believed It is no doubt true that P W 13 has in cross-examination admitted that the kammas of the village were not well-disposed towards the first accused; but nothing has been alleged against the witnesses to show that they had any particular reason to be ill-disposed towards the accused personally and to falsely implicate them. It has not been established that any one of the occurrence witnesses

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1. (1934) 67 M.L.J. 664: L.R. 61 I.A. 398: I L.R. 56 All. 645 (P.C.)

2. (1945) 2 M.L.J. 144: L.R. 72 I.A. 148 (P.C.)

was concerned in the bidding at the toddy sales. Day had already dawned by the time the occurrence took place and the deceased and P Ws. 2, 3, 4 and 5 could certainly have recognised the assailants It appears to us extremely unlikely that the deceased after having been savagely attacked would have ignored his real assailants and decided, when he must have known that his end was near, to implicate the accused falsely The fact that the name of P W 2 does not find a place in the dying declaration, far from being a point against the prosecution, appears to be one in its favour. It indicates that the deceased stated in that statement all that he could remember at the time When he was attacked, he might not have noticed P. W 2, though he had come on the scene. The version of the accused in Ex. K renders the story of the prosecution probable We are unable to find any support for the contention of the learned counsel for the respondents that Ex K relates to a different occurrence The fact that no complaint was made to the village munsiff in respect of the occurrence in question is hardly of any significance. The occurrence took place in the fields and the hospital is in Achanta where the Village Munsiff lives Taking the deceased to the hospital direct, was, in the circumstances of the case, a natural course to follow Considering the distance of three miles and the time the witnesses must have taken to make arrangements to carry the deceased to the hospital, it cannot be said that there was any avoidable delay.

We consider that the evidence for the prosecution was rightly believed by the learned Judge and that having regard to our observations on the question of common intention, the respondents are guilty of the offence of murder We therefore set aside their convictions and convict them instead, of the offence of murder.

As for the sentence we should have in the ordinary course imposed on the respondents the extreme penalty of the law, but having regard to the fact that the charge of murder was hanging over their heads for nearly a year and they have been once acquitted, we consider that the lesser sentence would meet the ends of justice We therefore substitute for the present sentences, the sentence of transportation for life in the case of each of the respondents.

V.P S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE KUPPUSWAMI AYYAR.

Narayana Aiyar .. *Petitioner*.*

Criminal Trial—Summons case—Accused secured by bailable warrant—Personal attendance—If can be dispensed with

In respect of certain offences punishable under sections 323 and 324 of the Penal Code, though the procedure to be followed is as in a summons case, the Magistrate happened to issue a bailable warrant and when the accused sought to have his personal attendance in Court dispensed with, the Magistrate refused the application on the ground that the prosecution of the accused was secured after the issue of a bailable warrant On revision,

Held, the Magistrate was not justified in taking his stand on an incorrect order of his for refusing the application. Even in a summons case it will be open to the Magistrate to insist upon the personal appearance of the accused but he will have to give reasons for the same.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Stationary Sub-Magistrate, Trichinopoly Town dated 28th December, 1945, in C. C No. 2183 of 1945, on the petition put in on behalf of the accused under section 205, Criminal Procedure Code, dated 28th December, 1945

P Narayana Kurup, *K S Narayana Aiyar* and *S Rajaraman* for Petitioner.

The Court made the following

ORDER —The petitioner was accused of having committed offences punishable under sections 323 and 324, Indian Penal Code The procedure to be followed

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* Cr R C No 132 of 1946 5th February, 1946
(Cr. R P No. 126 of 1946)

in such a case is as in a summons case But unfortunately the Magistrate happened to issue a bailable warrant and having issued a bailable warrant, when the petitioner sought to have his personal attendance in Court dispensed with, the Magistrate dismissed his application observing that the personal appearance of the accused cannot be dispensed with as in this case the prosecution of the accused was secured after the issue of a bailable warrant The Magistrate was not justified in taking his stand on an incorrect order of his for refusing the application Even in a summons case it will be open to the Magistrate to insist upon the personal appearance of the accused But then he will have to give reasons for the same Since he has not given any such reason in his order, it is set aside and the petition is remanded to him for considering the question whether there are sufficient grounds in this case for not dispensing with the personal appearance of the accused in spite of the fact that he committed the error of issuing a bailable warrant instead of treating the case as a summons case

K S *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE KUPPUSWAMI AYYAR.

V. T Elaya Pillai and others .. *Petitioners**

Criminal Trial—Preliminary enquiry—Power of Committing Magistrate—Power to sift evidence and discharge accused if evidence is unreliable.

A Magistrate who holds a preliminary enquiry could sift the evidence for ascertaining whether a case had been made out and whether the evidence is of such a character as is likely to convince a jury that the offence might have been committed If there is a reasonable doubt as to the truth or otherwise of the evidence before him, he should commit the case It is the duty of the Magistrate to see whether it is reasonably clear that upon the evidence the accused persons stand a chance of being convicted If the Magistrate finds that the evidence is not reliable he can discharge the accused. It cannot be said that it was for a jury to decide about the credibility or otherwise of the witnesses and that the Committing Magistrate had no right to decide that point.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sessions Judge of South Arcot, dated 9th day of July, 1945, and passed in Criminal Revision Petition No 8 of 1945

T. R Venkatarama Sastri and *K S Sankara Ayyar* for Petitioners

The Public Prosecutor (*V L Ethiraj*) on behalf of the Crown

The Court made the following

ORDER —The petitioners are accused 1 to 7 and 9 in Preliminary Register Case No. 7 of 1944, on the file of the Stationary Second Class Magistrate of Kallakurichi They, along with three others, were charged with having committed dacoity of ground-nuts, transported in bandies and belonging to P. W 14 The preliminary enquiry was held by the Magistrate, who, after sifting the evidence, found that it it was not reliable and discharged the accused The matter was taken in revision to the Court of the learned Sessions Judge of South Arcot. He agreed with the Magistrate with regard to two of the accused and, with regard to these petitioners, he thought that they ought not to have been discharged and that the matter should not have been decided by the Committing Magistrate, but should have been left to a jury, with whose assistance the Sessions Judge will be trying the case, if it had been committed to the Sessions It is to revise that order that this petition has been filed.

It is not disputed before me that a Magistrate, who holds the preliminary enquiry, could sift the evidence for ascertaining whether a case had been made out and whether the evidence is of such a character as is likely to convince a jury that the offence might have been committed The order of the learned Sessions Judge, except with regard to one sentence, conveys an impression that he was of opinion

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* Cr R C No 544 of 1945 8th February, 1946.
(Cr. R. P. No 503 of 1945)

that it was for a jury to decide the truth or otherwise in such matters and not for a Committing Magistrate In this case, the Committing Magistrate has not stated that there is no evidence on which a jury could convict the petitioners but he seems to have felt that the evidence was not of such a character as would justify his committing the case The learned Sessions Judge observes :

"It would be sufficient to observe that there is enough evidence on record to justify the case being placed before a jury."

If he meant by this that there was enough legal evidence though it may not be acceptable, he was certainly wrong. If he had meant that there was enough acceptable evidence, then he would be right But then in the next sentence he says :

"It is for a jury to say whether they believe the witnesses or not"

I do not think the Judge was right in saying that it was for a jury to decide about the credibility or otherwise of the witnesses and that the Committing Magistrate had no right to decide that point also The sentence which expresses his dissent from the Committing Magistrate is this

"I do not think it would be right to say that the evidence is so manifestly false that no reasonable man would believe it"

If he meant by this that he was of opinion that he was doubtful about the correctness of the finding of the Magistrate on the evidence let in and if he was right he would be justified in having set aside the order of discharge It was pointed out by King, J., in *Ella Reddi*, In re[1], that it is the duty of the Magistrate to weigh the evidence, and, if there is a reasonable doubt as to the truth or otherwise of the evidence before him, he should commit it The question hence here is whether there is any scope for reasonable doubt, or whether there is a case in which the evidence is not of such a character as would be proper or safe to rely upon In *Chandrakasa Malaivajar*, In re[2], it was pointed out by a Bench of this Court that it is the duty of the Committing Magistrate to sift the evidence and see whether it is reasonably clear that upon that evidence the accused persons stand a chance of being convicted. As many as 19 witnesses were examined for the prosecution and about 9 for the defence. The Magistrate has pointed out that the evidence of all these prosecution witnesses who have spoken about the occurrence was interested , they being either the servants or dependents of P W 14 It is not disputed for the prosecution that there have been ill-feeling and rivalry between P W 14 and the first accused If all the witnesses who have spoken about the occurrence are in one way or other connected with P W. 14 and if the circumstances of the case disclosed the possibility of other disinterested persons—and a large number of them too—having witnessed the occurrence and they had not been examined, these are circumstances to be taken into consideration by the Magistrate as indicating that the evidence is not of an acceptable character.

The offence is said to have been committed at night, openly in the presence of a large body of persons who were with these accused The carts were stopped. They were asked to proceed to a compound where the bulls were unyoked and the contents of these 17 carts loaded with ground-nuts were taken out The cartmen were asked to go away, and it is said that they were even offered the cart-hire by the dacoits. If that was so, it should have attracted a large crowd and it is in evidence that there are more than 100 houses near the scene of occurrence None of them have been examined. Apart from this, there is also the fact that all the witnesses, except one, said that it was a dark night At the same time it was stated that all these 17 carts had each of them a light and that there was a torchlight in the hands of the first accused. If it was dark and there was no light, the witnesses could not have seen the dacoits ; and if there were 17 lights, then it must have been possible for all of the witnesses to have seen them all. It is significant, as pointed out by the Magistrate, that no two witnesses are agreed as regards the persons whom they saw Each gave his own list of persons whom he saw Further, it is also to be remembered that the attitude of the cartmen, if the evidence is true, was against

1. (1937) Mad. Cr. Cas 124 : 1937 M W N. Cr 52.

2 (1931) Mad. Cr Cas 84 1931 M W N Cr. 12.

these dacoits, for they would not even receive the money It is in evidence that P. Ws 1 and 2 were asked to go out under the pretext that they had to answer the calls of nature and that they went for the purpose of reporting to P W. 14. If that was so, these victims must have made up their minds to take action, or to get action taken, against these dacoits for what they had done that night It is also in evidence that there is a police outpost very close to the scene of occurrence, but no complaint appears to have been made, though during the course of the enquiry it was said that an attempt was made to give information at the outpost and but there was no one there

Further, the occurrence was on the 19th night and no information to the police was given earlier than the 24th, *vide* Ex C There was absolutely no justification for this delay. Chinna Salem is within 9 miles of the scene of occurrence and it will not take more than 2 or 3 hours to reach Chinna Salem and give a complaint even if there was no one at the outpost near the scene of occurrence

There is one other circumstance which throws considerable doubt as regards the version given by the prosecution, namely, that in Ex C, the first information given which looks as if it had been prepared with care as the names of even the witnesses also are mentioned, there is no mention of accused 4 to 11 Of course, the name of the first accused was mentioned because he is the leader of the party against whom P. W. 14 had a grievance

Next, it is rather surprising that the stolen articles have not been recovered. The articles that are said to have been taken, are said to be worth Rs 1,700 It was a large amount for a villager and it is surprising that no attempt was made to seize the articles. During the course of the investigation certain ground-nuts in the railway station yard at Chinna Salem were sought to be identified as the goods that were stolen but, as pointed out by the Magistrate, the attempt was ludicrous. They were able to get only a small quantity of shelled ground-nuts and even the gunny bags were not identified as the bags that were stolen In a case like this, the first duty of the prosecution would be to get at the articles, especially as they were not articles that can be easily kept hidden. The articles found in Chinna Salem Railway Station were articles purchased by the first accused, and that was made clear by the accounts seized which showed that the first accused had paid money and purchased enough ground-nuts to get the shelled ground-nuts that were found in the railway station. The failure on the part of the prosecution to seize the ground-nuts in time or to take any steps to seize them, is a circumstance which throws a good deal of doubt on the prosecution version.

Further, the evidence as to the *alibi* of the first accused was sought to be corroborated by letters written by him which go to indicate that he had an idea of attending the funerals of his father-in-law, beforce the occurrence In addition to this, there was the evidence of witnesses who proved that he was there, and the village was 60 miles away Though that by itself would not be sufficient, that is a circumstance to be taken into consideration by a Magistrate and, if the other circumstances are also taken along with this, I think this is a case in which the Magistrate was justified in thinking that the evidence was not of such a character as would be likely to convince a jury about the guilt of the accused At any rate, there was considerable reasonable doubt about many aspects of the prosecution evidence on which the accused would be entitled to the benefit of the doubt which rightly influenced the Magistrate in coming to the conclusion that he should not commit the accused to the Sessions, and I do not think he was wrong

It is rather unfortunate, that the learned Sessions Judge has not discussed any of these points He simply noted that it would be embarrassing if he were to discuss them. What was in the mind of the Judge is not clear If he only meant that it was not the duty of a Committing Magistrate to sift the evidence to see if it was acceptable or not, he is wrong But if he was of opinion that his appreciation of the evidence was incorrect, he has not indicated it in his order. The Magistrate

has dealt with the case in all its details and, having read his order, I do not think I will be justified in differing from him in his appreciation of the evidence

This is a case in which there is a good deal of doubt as regards the truth of the evidence of the prosecution witnesses on various points There has been delay not only in investigation but also in giving the first information to the authorities The stolen articles have not been seized In addition to all these, the names of as many as 8 accused persons had not been mentioned in the first information report given some days after the occurrence When all this is borne in mind and if the evidence is sifted in the light of these facts, I think the Magistrate was right in thinking that there was not enough reliable evidence that the accused were guilty.

The order of the learned Sessions Judge, setting aside the discharge of the petitioners, is cancelled and the order of the Magistrate discharging them, will be restored.

K S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE HAPPELL

Isaka Venkatareddi and another *Petitioners**

v

Vemireddi Rangareddi and others *Respondents*

Civil Procedure Code (V of 1908), *Order* 17 *rules* 2 *and* 3—*Court purporting to act under Order* 17, *rule* 3—*Real nature of the order—Counsel asking for adjournment and on refusal reporting no instruction—Presence of party—If affects the question*

A suit was posted for hearing on a particular date after two adjournments and on that date a pleader applied for an adjournment as the pleader appearing for the plaintiff (respondent) was ill. The adjournment was refused and the pleader represented that he had instruction from the pleader appearing for the plaintiff and who was ill to report no instructions The plaintiff (respondent) was present in Court Thereupon the Judge dismissed the suit under O 17, r 3. The plaintiff (respondent) applied under O 9, r 9 to have the order of dismissal set aside The suit was restored to file on the ground that though the order of dismissal purported to be under Order 17, rule 3, it was really an order under Order 17, rule 2 On revision

Held, the order of dismissal should be regarded as an order made under Order 17, rule 2 and not under rule 3, for O 17, r 3, applies only to cases where the parties are present The mere physical presence of the plaintiff (respondent) did not affect the question Case law discussed

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of Nellore, dated 26th July, 1945, and made in I A No 59 of 1945, in O S No. 19 of 1937

K. Umamaheswaram and *Alladi Kuppuswami* for Petitioners

M S. Ramachandra Rao and *D. R Krishna Rao* for Respondents.

The Court delivered the following

JUDGMENT —Two points arise for decision in this petition The first is whether the decree passed by the District Judge of Nellore dismissing O S No 19 of 1937, should be regarded as having been made under Order 17, rule 3 of the Civil Procedure Code or under Order 17, rule 2, and the second is whether in any case, the respondent-plaintiff was entitled to make an application to have the decree set aside, or whether his only and proper remedy was not by way of appeal

The revision petition filed by the respondent-plaintiff in connection with the suit had been dismissed by this Court on the 9th April, 1945 Thereafter the suit was posted by the District Judge for further trial on the 16th April, 1945, and then, after two adjournments, on the 23rd April, 1945, a pleader on behalf of the plaintiff informed the Court that the respondent-plaintiff's

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* C. R. P. No 997 of 1945 4th February, 1946

pleader was ill and had asked him to apply for an adjournment The adjournment was refused and the pleader then stated that he had instructions from the pleader appearing for the plaintiff to report no instructions Thereupon the learned District Judge dismissed the suit and stated that he did so under the provisions of Order 17, rule 3 of the Code The respondent-plaintiff was himself present when the request for an adjournment was made Against the decree dismissing the suit, the respondent-plaintiff filed an application under Order 9, rule 9, to have the decree set aside on the footing that it was an *ex parte* decree and that he had sufficient cause for his non-appearance On this application the District Judge, Mr P. N. Ramaswami—Mr. Azeem had passed the judgment and decree in the suit—held that the judgment passed by his predecessor on 30th April, 1945, although purporting to be a judgment on merits under Order 17, rule 3, was in fact an order of dismissal for default under Order 17, rule 2 , and holding also that the plaintiff had had reasonable grounds for his non-appearance, he set aside the order of dismissal and directed that the suit should be restored to file and heard on merits. In paragraph 2 of his order the learned District Judge has observed that on the state of the case law so far as this Province is concerned there cannot be any doubt that this judgment purporting to be on merits has to be construed as a dismissal order for default. On this point the view taken by the learned District Judge is undoubtedly correct It was decided by a Full Bench of this Court in *Pichamma* v. *Sreeramulu*[1] that Order 17, rule 3 applied only to cases where the parties are present It has, of course, still to be decided on the facts of each case whether the parties were " present or not " There is, however, no doubt that on the facts of this case the plaintiff and his pleader must be regarded as having been absent on the 23rd April. The physical presence of the plaintiff when it was represented that his counsel could not go on with the case and when it was represented that his counsel reported no instructions makes no difference There is ample authority for this, vide *Kaliappa Mudaliar* v *Kumaraswami Mudaliar*[2], and the cases collected therein The order made by the District Judge dismissing the suit although purporting to be made under Order 17, rule 3 must be deemed to have been made under Order 17 rule 2 and that being so I do not see any sufficient reason in revision to differ from the view taken by the District Judge that the illness of his counsel was a reasonable cause for the non-appearance of the plaintiff

In the course of his argument, learned counsel for the petitioners has raised for the first time the contention that the application by the respondent-plaintiff should have been dismissed because in any case the procedure adopted by him was misconceived. He argues that as the District Judge said that he had dismissed the suit under Order 17, rule 3, the respondent-plaintiff should have filed an appeal against the decree and had no right to treat the decree as if it was an *ex parte* decree and ask that it should be set aside by an application under Order 9, rule 9 This argument is based on a decision of a Bench of this Court in *Chenroyan* v *Rama Chetti*[3]. In that case it was stated that the petitioner ought to have followed the course which the plaintiffs had adopted in *Chandramathi* v *Narayanaswami Iyer*[4], *viz* , that he ought to have appealed against the Munsiff's decree purporting to have been passed on merits under Order 17, rule 3, of the Civil Procedure Code, instead of treating the decree as an *ex parte* decree and applying to have it set aside Reference to *Chandramathi Ammal* v *Narayanaswami Iyer*[4], shows that in that case it was mentioned that the appellant had previously filed an application to have an *ex parte* decree set aside, but had ultimately obeyed the direction of the High Court that the proper procedure was for him to file an appeal. I can understand a distinction being drawn between a case in which the Court has expressly stated that it has dismissed the suit under Order 17, rule 3, and cases where there is no clear indication whether the Court has dismissed the suit under Order 17, rule 3 or Order 17, rule 2. No

1 (1917) 34 M L J 24 I.L R 41 Mad. 286 (F B)
2 (1926) 51 M L J 290
3 (1916) 3 L W 524
4. (1909) 19 M L J 760 I L R 33 Mad. 241.

distinction of this kind, however, seems to have governed the decision in *Chenroyan v. Rama Chetti* [1] On the other hand in *Pichamma* v. *Sreeramulu*[2], the case started on an application under Order 9, rule 9 to have an *ex parte* decree set aside although the decree was one which the District Munsiff himself stated he had passed under Order 17, rule 3 No objection was taken to the procedure and both the Bench which referred the case and the Full Bench proceeded on the footing that the application was competent Again in *Kaliappa Mudaliar* v. *Kumaraswami Mudaliar*[3], although, as in *Chenroyan* v *Rama Chetti*[1], the order of dismissal was one purporting to have been made under Order 17, rule 3, no objection was taken to the procedure by way of an application to have the decree set aside as if it had been an *ex parte* decree. *Chenroyan* v *Rama Chetti*[1] was a case decided in the exercise of the Court's revisional jurisdiction and it does not seem to me that it should be taken to have decided more than that in the circumstances of that case the petitioner should file an appeal as he had in effect been directed to do by the lower appellate Court. In that view this petition fails and is dismissed with costs

V.P S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE SOMAYYA

Ittoli Moidin Koya's son Koyatti and others .. *Appellants**

v

Imbichi Koya and others . *Respondents.*

Evidence—Final decree for partition not drawn up on non-judicial stamp paper and not registered—Not admissible in evidence—Other evidence—Limits to admissibility of—Stamp Act (II of 1899), section 35—Registration Act (XVI of 1908), sections 17 and 49—Remedy of such decree-holder

Co-owners—Purchaser of share of one in one item—Suit to recover such share—If to be by one for general partition—Right of co-owners impleaded as defendants to ask Court to divide all properties

It is the obvious duty of the Courts in passing final decrees for partition to insist upon the parties supplying the necessary stamp paper of proper denomination and to have the final decree drawn up on such non-judicial stamp paper Where a compromise decree for partition is not so stamped under section 35 of the Stamp Act the document cannot be adduced in evidence for any purpose whatever. Further being an instrument of partition as defined under the Registration Act, the final decree has be to be registered Such a final decree will be a nullity and the suit may be considered to be pending and it may be open to parties to approach the Court which passed that decree and request the Court to pass a fresh final decree after supplying the necessary stamp paper

But the partition may be proved by other evidence

Quaere Whether other evidence is admissible to prove details of the partition in addition to proof of division in status?

Ramayya v *Achamma*, (1944) 2 M L J 164 I L R 1945 Mad 160 (F B), if still good law after decision of Privy Council in *Ram Rattan* v *Paramanand*, (1946) 1 M L J 295 (P C)

The purchaser of a co-owner's share in one particular item of property can file a suit for recovery of that share in the item without filing a suit for general partition *Pakkiri Kanni* v. *Manjoor Sahib*, (1923) 45 M L J 321 I L R 46 M 844 relied on It is open in such a case to the co-owners impleaded as defendants to ask the Court to effect a division of all the properties

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A S No 4 of 1944 preferred against the decree of the District Munsiff Court of Calicut in O S 891 of 1939

S. T Srinivasagopalachari and *K. P Ramakrishna Aiyar* for Appellants.

S R Subramania Aiyar and *C D. Venkataramanan* for Respondents.

The Court delivered the following

JUDGMENT —Three brothers of the Ittoli family, namely, Moideen Koya, Mamoo and Ahammad were carrying on business in hardware and sundries They acquired the A schedule property under Ex P-8, dated 11th August, 1917, a sale deed which stands in the names of the three brothers. They acquired also other properties that are set out in schedules B and C The first item in the B Schedule

1. (1916) 3 L W 524 (F B)
2. (1917) 34 M L J 24 I L R. 41 Mad 286
3. (1926) 51 M.L.J 290.

*S A No 535 of 1945 28th March, 1946.

is the family house and the paramba attached to it. Moideen Koya died in 1926 and his heirs are defendants 2 to 6 Mamoo is the first defendant in the suit. Ahammad died between 1936 and 1939 leaving a widow, the tenth defendant and several children who are defendants 7, 8, 9 and 11. The plaintiff is the Court auction-purchaser in execution of a small cause decree passed in S C S No. 134 of 1936 A third party filed that suit against Ahammad Koya, obtained a decree and bought the undivided one-third share of Ahammad, the judgment-debtor in the A schedule property After purchasing the property the plaintiff got symbolical delivery and then filed the present suit on 13th October, 1939, for partition and delivery to him of the one-third share of Ahammad Koya. The contesting defendants are defendants 2,5 and 6, who are the appellants in this Court. Their defence is that in a partition suit filed by them in the Sub-Court of Calicut, O S No 34 of 1935 the whole of A schedule property was allotted to their share. It is said that item 2 of the present B schedule was given to defendants 3 and 4 and that items 1 and 3 of the B schedule were left to be enjoyed as common properties by all the three branches. According to this partition Ahammad's representatives or Mammu, the first defendant, were not given any separate properties in addition to the common right in items 1 and 3 of the B schedule for the reason that they had largely overdrawn from the funds of the partnership or from the other funds of the family. Unfortunately the decree was not drawn up on a non-judicial stamp paper as required by law. The final decree is said to have been passed in the later part of 1937.

If there had been a valid decree in force then the plaintiff would get nothing because his purchase would be subject to the rights declared under that decree. That decree having given the whole of A schedule property to the appellants there was no right of Ahammad in the A Schedule property which could be purchased by the Plaintiff and he would have to be non-suited. Unfortunately the Court did not take care to see that the decree was drawn up on non-judicial stamp paper. It is the obvious duty of the Court in passing final decrees for partition to insist upon the parties supplying the necessary stamp paper of proper denomination and to have the final decree drawn up on such non-judicial stamp paper That was not done. The parties did not realise the consequences of this omission and the result has been very unfortunate from the standpoint of the appellants.

Both the lower Courts have declined to admit the compromise decree in evidence on the ground that the document required to be stamped, that it was admittedly not stamped and that under section 35 of the Indian Stamp Act, the document cannot be adduced in evidence for any purpose whatever Another objection taken was that being an instrument of partition as defined under the Registration Act the final decree has to be registered. That again was not done. Though it has been repeatedly pointed out that the Courts ought to be careful in drafting the proper decree in such cases, numerous instances have come before this Court in which this duty has been neglected by the lower Courts and that has brought about incalculable harm and injury to the parties concerned.

However, we have to deal with facts as they are, and here the compromise decree and the compromise have to be rejected as inadmissible in evidence for the reasons stated above. A decision of this Court in *Ramayya* v. *Achamma*[1], held that where a deed of partition is inadmissible for want of registration the parties are not entitled to prove by other evidence the details of the partition in so far as the immoveable properties are concerned. Proof cannot be given that particular items of immoveable property fell to particular sharers. It is argued for the appellants that in so far as this dcision held that even other evidence is not admissible to prove which item fell to which individual sharer, the matter will have to be reconsidered in the light of the decision of the Judicial Committee reported in *Ram Rattan* v *Paramanand*[2] It is urged that in that case a document which was in effect a partition deed was relied on to prove the details of the partition, that

1. (1944) 2 M L J 164 I.L R. (1945) Mad. 160 (F.B).
2 (1946) 1 M L J 295 (P C)

the document was rejected by the Judicial Committee for the reason that it was unstamped and therefore not admissible in evidence for any purpose whatever under section 35 of the Stamp Act and that having rejected the document their Lordships held that the other evidence proved the partition Reliance is placed on the following passage in page 198

"Their Lordships therefore pay no regard to the documents marked 'C' and 'D' but they are in agreement with the High Court in thinking that the oral evidence proved partition in February, 1939"

The Judicial Committee did not refer to the difficulty of admitting other evidence when the transaction was admittedly reduced to writing and that writing was inadmissible either under section 35 of the Stamp Act or under sections 17 and 49 of the Registration Act But there is no doubt that the Judicial Committee had no difficulty in finding a partition on other evidence But whether other evidence is admissible to prove the details of the partition is still open to doubt It is not clear whether oral evidence was accepted only in proof of the division in status or to prove the details of the partition. When the question directly arises hereafter in this Court, we may have to consider whether the Full Bench decision in *Ramayya* v *Achamma*[1], is good law after the decision of the Judicial Committee.

If the appellants had adduced other evidence to prove that a partition took place in 1937 allotting the whole of A schedule property to the appellants, the fact that the compromise decree is inadmissible in evidence may not have stood in the way of the appellants' succeeding in the case. But unfortunately the appellants did not adduce any other evidence to prove that there was a partition in 1937 apart from the production of the certified copies of the compromise and the compromise decree. There was only one witness for the plaintiff and one witness for the defendant and on this evidence it is not possible to find the partition apart from the compromise and the compromise decree The result is no doubt very unfortunate but the appellants might perhaps have cured the defect by adducing other evidence and that, they have not done

The effect of not engrossing the final decree for partition on a non-judicial stamp-paper has been the subject of various decisions of this and other High Courts. In *Jotindra Mohan Tagore* v *Bejoy Chand Mahatap*[2], it was held that a decree which is not drawn up on a proper non-judicial stamp paper is a nullity and that the suit must be considered to be pending In *Satyanandhan* v *Nanayya*[3], Burn and Lakshmana Rao, JJ, observed that " a final decree for partition has no existence as a decree until it is engrossed on the proper non-judicial stamp paper, till that is done the suit is pending" A slightly different view has been expressed in *Venkatappa* v. *Venkatappa*[4] It may be that the appellants are entitled to approach the Sub-Court of Calicut and point out that the decree in O S No 34 of 1935 must still be considered to be pending and request the Court to pass a final decree after supplying the proper non-judicial stamp paper In that case it will be open of course to the other parties to raise such objections as are open to them, and if a final decree is hereafter passed, what effect it will have on the rights of the plaintiff in this suit is another matter Even if the plaintiff in this suit is not to be bound by any later decree drawn in O S. No 34 of 1935 on a proper non-judicial stamp paper it will still be open to the appellants to urge as against the other co-sharers and particularly against the heirs-at-law of Ahammad to say that having regard to the events that have happened they should not be given any share in any of other properties particularly in items 1 and 3 of the B schedule

The next question urged is whether the purchaser of a co-owner's share in one particular item can file a suit for recovery of the share that he has purchased in one item without filing a suit for general partition. As held by this Court in *Pakkiri Kanni* v *Manjoor Sahib*[5], there is no such disability laid on the purchaser of a co-owner's share It is open in such cases to the co-sharers who are impleaded

1 (1944) 2 M L J 164 · I L.R (1945) Mad 160 (F B)
2 (1904) I L R 32 Cal. 483
3 (1937) 47 L.W. 51.
4 (1943) 2 M L.J 112. I L R. 1944 Mad. 266
5 (1923) 45 M L J. 321 I.L.R 46 Mad. 844.

as defendants to ask the Court to effect a division of all the properties. The plea raised in the written statement was that the suit is bad for partial partition and that it must include all the properties held by the family or by the co-owners. The issue raised is as follows "Is the suit as framed unsustainable as one for partial partition?" In this form the question is concluded by the decision of this Court in *Pakkiri Kanni* v *Manjoor Saheb*[1], and that is probably the reason why the advocate appearing for the sixth defendant who is one of the appellants expressly gave up this issue before the trial Court

Mr S T Srinivasagopalachari, the learned advocate for the appellants then urges that there are equities which have to be worked out between the co-sharers, particularly, between the heirs of Ahammad on the one side and the appellants on the other side and that those equities arise out of the fact that Ahammad had drawn large amounts from the assets of the partnership and from the other assets of the famiy If Ahammad had filed a suit for partition, he would certainly be bound by all the equities in favour of the other co-sharers He cannot get a decree for partition of the properties without meeting all the liabilities A purchaser from one of the co-sharers is in no better position than the alienor himself. Whether the purchase is by private alienation or Court-sale, in either case the purchaser cannot have a higher right than that of the co-owner whose rights he has purchased Here again the trouble is that there is no plea in the written statement that even if the plaintiff is entitled to a partition and delivery of one-third of the A schedule properties he should be directed to pay any sum or sums to the appellants The only plea that was raised was that the plaintiff is not entitled to any share in the A schedule property for the reason that in adjustment of the previous indebtedness of Ahammad the whole of the A schedule property had been validly allotted to the appellants There is no plea that any equity should be worked out in this suit as against the plaintiff Here again it is unfortunate that owing to lack of pleading and proof the appellants have to suffer. As there was no pleading there was no issue regarding the question of equities in favour of the appellants and there was no evidence about it

The last point urged is that the property was really partnership property and that it was not validly attached under Order 21, rule 49, Civil Procedure Code. Both the Courts have found that the property was not partnership property but that it was property held as tenants in common by the three brothers This is a question of fact, and I see no reason to interfere with that finding

The result is that the second appeal fails and is dismissed. I make no order as to costs of this Court. No leave

K S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE HAPPELL.

Chittoori Potharaju *Petitioner*.*

Hoarding and Profiteering Prevention Ordinance (XXXV of 1943) sections 6 (1) and 13 (1)—Sale of beedies at a price more than 20 per cent above purchase price—Offence—Overhead charges and taxes—Not to be deducted from sale price in computing profit

In a prosecution for contravention of the Hoarding and Profiteering Prevention Ordinance by selling beedies at a price more than 20 per cent above the price for which they were purchased, the accused cannot contend that he was entitled to deduct from the sale price overhead charges and so forth 20 per cent is a profit which is clearly intended to cover such charges, nor can the accused deduct the tobacco-tax as the tax is paid by the purchaser and the sale price excluded in the particular case such tax Any plea that higher profits were not unreasonable in view of the normal trade practice should have been pleaded and proved in the trial and the plea cannot be raised in revision

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1. (1923) 45 M L J 321 : I L R 46 Mad 844

* Crl. R C No 678 of 1944 30th November, 1944.
(Cr. R P. No 641 of 1944)

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of Kistna Division at Chilakalapudi dated 26th August, 1944, and passed in C A. No. 65 of 1944 (C C No 7 of 1944, on the file of the Court of the Additional District Magistrate of Kistna)

K S. Jayarama Aiyar and *P. Suryanarayana* for Petitioner.

The Public Prosecutor (*V L Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER —The petitioner has been convicted of a contravention of the Hoarding and Profiteering Ordinance and has been sentenced to undergo rigorous imprisonment for one month and to pay a fine of Rs 150 on the footing that the sale by the petitioner of his beedies at a price more than 20 per cent above the price for which they were purchased amounted to offences under sections 6 (1) and 13 (1) of the Ordinance The prosecution case was that the petitioner had sold a bundle of one type of beedies at a price which was 41 per cent. more than the purchase price and another bundle of beedies at a price which was 25 per cent above the purchase price. The arithmetical calculations made by the lower Court are correct and although there is no evidence with regard to the cost of production the assumption that the whole-sale purchase price would, at any rate, not be below the cost of production is justified I do not accept the contention advanced for the petitioner that he was entitled to deduct from the sale price overhead charges and so forth 20 per cent. is a profit which is clearly intended to cover such charges, nor do I accept the argument that he was entitled to deduct the tobacco-tax Tobacco-tax is paid by the purchaser and so far as appears from the evidence the sale prices of Rs 3 and Rs 2-8-0 excluded the tobacco-tax The last argument advanced that the criterion of unreasonable profit should not have been 20 per cent. above the cost of production but the profit allowed by the normal trade practice also has no substance The prosecution was brought on the footing that the offences were committed because the sales gave a profit of more than 20 per cent. above the cost of production and if there was a normal trade practice of a profit greater than this, it should have been pleaded by the petitioner and he should have proved it. The convictions were therefore correct. This does not, however, seem to be a very gross case of profiteering and I think consequently that the ends of justice will be met if the sentence of imprisonment is reduced to the period already undergone while the sentence of fine is confirmed. In other respects the petition is dismissed.

K S. *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE KUPPUSWAMI AYYAR.

Vempati Satyanarayana Sastri . *Petitioner**.

Criminal Procedure Code (V of 1898), section 145—Complaint of likelihood of breach of peace by reason of counter-petitioners' acts—Order to police to warn opposite party without any enquiry—Legality—Sessions Judge if can set aside such an order in revision—Proper procedure

The petitioner filed before the Joint Magistrate of the place complaining that the counter-petitioners and their party had no right to recite certain Sankalpams at the Tirumalai tank and that there was a likelihood of breach of peace by their reciting such Sankalpams The Joint Magistrate without taking evidence and going into the matter directed the police to warn the counter-petitioners not to create a breach of the peace by such recitations. The matter was taken in revision to the Sessions Judge who set aside the order of warning On revision to the High Court,

Held, that the Joint Magistrate was not justified in asking the police to warn the counter-petitioners without taking evidence and deciding whether such a right was there or not Nor had the Sessions Judge any jurisdiction to sit in revision over such an order and pass an order himself If the Sessions Judge found the order of the Joint Magistrate wrong, he should have written to the High Court and asked it to interfere.

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* Cr. R. C No 12 of 1946. 14th March, 1946
(Cr R P No. 11 of 1946).

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Session of Chittoor Division dated 26th November, 1945, in Criminal Revision Petition No. 6 of 1945, presented against the order of the Court of the Joint Magistrate, Chandragiri, dated 28th June, 1945, in L. Dis No 4532 of 1945.

V T. Rangaswami Aiyangar and *K Kalyanasundaram* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown

The Court made the following

ORDER —The petitioner filed a petition before the Joint Magistrate of Chandragiri complaining that the counter-petitioners and their party had no right to recite *Sankalpam* at the tank at the Thirumalai hills at Tirupathi and that there was a likelihood of a breach of the peace. Instead of taking evidence and going into the matter the Joint Magistrate directed the police to warn the counter-petitioners not to create a breach of the peace by reciting such *Sankalpams* The matter was taken in revision to the learned Sessions Judge of Chittoor and he set aside the order of warning.

I am not able to see what jurisdiction the first Court had to issue such a warning without taking evidence and deciding whether such a right was there or not. Nor has the learned Sessions Judge any jurisdiction to sit in revision over such an order and pass an order himself If the order of the joint Magistrate was wrong, then the Sessions Judge should have written to this Court and asked this Court to interfere. Instead of doing that he has himself set aside the order This is therefore a case in which both the Courts had no right to pass the orders which they purported to pass Without taking evidence the joint Magistrate was not justified in asking the police to warn the counter-petitioners In these circumstances both the orders of the learned Sessions Judge and the Joint Magistrate are set aside.

K C. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE HAPPELL

Venkatasubba Reddy . *Petitioner**

v

Ramadoss Reddy *Respondent.*

Court-Fees Act (VII of 1870), section 12—Registration of suit after some arguments as to question of court-fee—Reservation and trial of question as to court-fee as an issue in the suit—Not barred

No doubt when the court-fee paid has been accepted without objection and the suit has been determined the Court may be deemed to have decided that the court-fee paid was correct within the meaning of section 12 of the Court-Fees Act even though it has passed no specific order to that effect But while a case is still pending the acceptance by a ministerial officer of the Court-fee paid or the registration of the case without objection cannot be deemed to be a final decision of the question of the court-fee to be paid. The only final decision is an order of the Court made after it has applied its mind to the question and it is open to the Court to take up and decide the question of the correct court-fee payable at any time before the case is determined provided that it has not already made a considered order. Accordingly though a suit is registered and numbered it is open to the Court to decide the question of Court-fee as an issue in the suit itself The mere fact that some arguments on the question of court-fee were heard before the registration of the suit will not be tantamount to a decision that the court-fee paid was correct so as to bar the trial of such question as an issue in the suit

Decision of Byers, J , in C R P No 1310 of 1945 and of Bell, J , in C. R P. Nos. 562 and 563 of 1945, approved and followed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Arni, dated 18th October, 1945, in O S. No. 214 of 1945.

M S. Venkatarama Aiyar for Petitioner.

The Government Pleader (*K Kuttikrishna Menon*) and *S. Ramachandra Aiyar* for Respondent

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* C R P No. 1366 of 1945 28th March, 1946.

The Court delivered the following

JUDGMENT.—The question in this civil revision petition relates to the Court-fee payable on O. S No 214 of 1945 in the Court of the District Munsiff of Arni. The suit was for a declaration that a compromise decree was not binding on the plaintiff and for an injunction restraining the defendant from executing the decree. The Plaintiff (the petitioner here) paid a Court-fee of Rs. 15 under Article 17-B of the Court-Fees Act; but the learned District Munsiff held that Court-fee must be paid under section 7 (*iv*) (*A*) on the market value of the properties covered by the compromise decree The learned District Munsiff framed an issue on the question of the Court-fee payable and decided it as the third issue in the suit by the order which is now under consideration

The first argument advanced by learned Counsel for the petitioner is that the learned District Munsiff had no jurisdiction to make the order which he did as he had already decided the Court-fee payable within the meaning of section 12 (1) of the Court-fees Act so that the decision had become final in the words of that section " as between the parties to the suit " Before the learned District Munsiff had passed his order on issue 3 relating to the Court-fee payable in respect of the suit, the suit had been registered Learned Counsel for the petitioner does not go so far as to argue that the mere fact of registration must be taken as a decision that the Court-fee paid is correct, but he does argue that in the circumstances of this case, as the District Munsiff had heard some argument on the question of the Court-fee to be paid and thereafter the plaint was registered, it should be taken that there was a decision that the Court-fee paid was correct. The mere fact, however, that some argument had been heard will not make the registration of the suit tantamount to a decision that the Court-fee paid was correct It is clear from what the learned District Munsiff himself has said that he reserved the question of the correctness of the Court-fee paid for decision at a later stage and that he had not applied his mind to and decided the question at the time when the suit was registered The learned Government Pleader has referred me to two recent unpublished decisions of Byers, J, in C R. P. No. 1310 of 1945 and Bell, J, in C R. P Nos. 562 ond 563 of 1945 in which the question of what will amount to a decision of the question of the Court-fee payable was considered With respect, I agree with what is said in the two judgments. No doubt when the Court-fee paid has been accepted without objection and the suit has been determined the Court may be deemed to have decided that the Court-fee paid was correct within the meaning of section 12 of the Court-fees Act even though it has passed no specific order to that effect. But while a case is still pending the acceptance by a ministerial officer of the Court-fee paid or the registration of the case without objection cannot be deemed to be a final decision of the question of the Court-fee to be paid The only final decision is an order of the Court made after it has applied its mind to the question and it is open to the Court to take up and decide the question of the correct Court-fee payable at any time before the case is determined provided that it has not already made a considered order In the present case it is quite plain that until the District Munsiff heard arguments on the isue relating to Court-fee he had not applied his mind to the question of the Court-fee that was properly payable. The first contention advanced, therefore, fails

It is also argued that the learned District Munsiff was wrong in directing that Court-fee should be paid on the market value of the lands covered by the compromise decree. It is said that what the plaintiff wants to get rid of is the leasehold interest given to the defendant by the decree, so that Court-fee should be paid not on the market value of the property as a whole but on its leasehold value From the order of the District Munsiff this point does not seem to have been taken before him. The petitioner, however, will be at liberty to raise it and the question will be left to be decided by the District Munsiff The petition is dismissed with costs, one set to be shared between the Government Pleader and the respondents.

K S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE HAPPELL.

The Public Prosecutor, Madras .. *Appellant**

v

Venkadari Naga Pulliah Chetti .. *Respondent.*

Madras Prevention of Adulteration Act (III of 1918), sections 5 (1) (a) and (d) and 6 (2) (a) (1) and (2)—Sale by shop-keeper of labelled tins of "coffee tablets," "Pure coffee 50 per cent and roasted coffee husk 50 per cent"—Representation found false on analysis—Ignorance of the vendor of the nature of contents, not a defence to a prosecution under section 5—Cash bill issued to shop-keeper if a warranty within the meaning of section 6 (2) (a) (1)

A shop-keeper sold some tins labelled "Sri Sai Coffee Tablets," "Pure coffee 50 per cent and roasted coffee husk 50 per cent" On an analysis it was found to contain only 15 per cent pure coffee and 85 per cent of some substance which was imitation coffee On a prosecution of the shop-keeper under section 5 (1) (a) and (d) of the Madras Prevention of Adulteration Act read with rules 36 (b) and 40 framed under the Act,

Held, that it was no defence to a prosecution for an offence under section 5 to allege merely that the vendor was ignorant of the nature, substance or quality of the food sold by him The cash bill issued to the shop-keeper together with the label were not by themselves sufficient warranty within the meaning of section 6 (2) (a) (1) The warranty referred to in that section is by the terms of the section itself "a written warranty in the prescribed form" A label or a cash bill of course is not a written warranty in the prescribed form

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Stationary Sub-Magistrate of Nandyal in C. C No 553 of 1944, on his file on 23rd October, 1944

The Assistant Public Prosecutor (*A S. Sivakaminathan*) for Appellant.

A Gopalacharlu and *T V. Subba Rao* for Respondent.

The Court delivered the following

JUDGMENT —This is an appeal by the Provincial Government against the acquittal of the accused in C C No 553 of 1944 in the Court of the Stationary Sub-Magistrate of Nandyal The accused is a shop-keeper and he had in his shop some tins labelled "Sri Sai Coffee Tablets," "Pure Coffee 50 per cent and roasted Coffee husk 50 per cent" He sold some of these tablets to the Sanitary Inspector of the Nandyal Municipality on the 13th May, 1944, and, on analysis, they were found to contain not 50 per cent of coffee and 50 per cent of roasted coffee husk but 15 per cent of coffee and 85 per cent of some other substance referred to as imitation coffee which contained no coffee husk On the footing of this analysis he was prosecuted for an offence punishable under section 5 (1) (*a*) and (*d*) of the Madras Prevention of Adulteration Act, 1918, read with rules 36 (*b*) and 40 framed under the Act On receiving a notice of the summons the accused sent to the local executive officer a copy of the cash bill which he had received in respect of the tin of coffee and husk with the written notice required under the first proviso to section 6 (2) (*a*) of the Act that he intended to rely on it The Stationary Sub-Magistrate found that the cash bill was not a warranty within the meaning of section 6 (2) (*a*), sub-section (1), but, nonetheless, rather surprisingly acquitted the accused on the ground that he was not responsible for the alleged adulteration and that he sold the tablets in the same condition as that in which he received them from D W 1 The defence accepted by the Magistrate is a defence expressly excluded under section 6, sub-section (1), of the Prevention of Adulteration Act which states that save as otherwise provided under sub-section (2), it shall be no defence to a prosecution for an offence under section 5, to allege merely that the vendor was ignorant of the nature, substance or quality of the food sold by him, etc. Learned Counsel for the accused does not support the reasoning of the Magistrate, but he argues that the cash bill taken with the label were themselves sufficient warranty within the meaning of section 6 (2) (*a*) (1) This contention obviously cannot be accepted as the warranty referred to in section 6 (2) (*a*) (1) is by the terms of the section itself "a written warranty in the prescribed form." A label

* Crl Appeal No 85 of 1945. 26th April, 1945.

or cash bill of course is not a written warranty in the prescribed form. The accused therefore clearly committed the offence with which he was charged under section 5 (1) (*a*) and (*d*) of the Act read with rules 36 (*b*) and 40.

The order of acquittal passed by the Magistrate is therefore set aside and the accused is convicted of the offence charged In the circumstances it does not seem to me necessary to pass anything but a nominal sentence. I accordingly sentence the accused to pay a fine of Rs. 5 or, in default of payment, to undergo, one week's simple imprisonment

V S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE YAHYA ALI.

Mettu Bhimudu . *Petitioner**

v.

Duggirala Pitchayya and others . .. *Respondents*

Civil Procedure Code (V of 1908), Order 6, rule 17—Amendment of plaint necessitated by death of defendant —Suit for partition and possession of his share by adopted son against adoptive father—Death of latter before service of summons—His widow and daughter added as legal representatives—Denial by them of adoption and setting up of will in their favour—Amendment asking for possession of the whole property after ejecting the defendants —Only a just development of original case—No variation or alteration of the fundamental character of the suit

In a suit by an adopted son against his adoptive father for partition and possession of his half share, the father died before the service of summons and thereupon his widow and daughter were brought on record They denied the adoption and set up a will in their favour by the deceased. As a consequence of this the plaintiff feeling obliged to ask for reliefs appropriate to the altered situation applied for an amendment of the plaint By the amendment he sought to plead that by reason of the death of his adoptive father, the whole of the suit property passed to him according to Hindu Law and that he had therefore absolute right to obtain possession thereof and that the widow and daughter had no rights at all as the will set up by them was not genuine He asked for the delivery of possession of the property ejecting the defendants therefrom On a contention that the amendment altered the nature of the suit and therefore ought not to be allowed,

Held, negativing such contention, that having regard to the nature of the original and amended pleadings it cannot be said that there is such variation thereof in the amendment asked for that in giving effect to the spirit of Order VI, rule 17, Civil Procedure Code, the amendment ought to be refused. The necessity for amendment arose out of circumstances which happened after the filing of the suit The real basis or foundation of the claim in either situation is the alleged adoption. It was a necessary and just development of the plaintiff's original case that he should ask for physical possession of the property on the strength of his alleged right of adoption and in doing so it cannot be said that there is an alteration or variation of the fundamental character of the suit or that it is a case where one cause of action has been substituted for another There is no new cause of action as the title remains the same and in any case there is no prejudice caused to the defendants

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Ramachandrapuram, dated 14th July, 1945, in C M P —I A No 630 of 1945 in O S No. 112 of 1944.

N Bapi Raju for Petitioner.

P V Vallabhacharyulu for Respondents.

The Court delivered the following

JUDGMENT —This is an application to revise the order of the District Munsiff of Ramachandrapuram rejecting the petitioner's application under Order VI, rule 17 of the Civil Procedure Code for amending the plaint filed by him in O S. No. 112 of 1944. The plaintiff alleged in the plaint that he was adopted in 1922 by his paternal uncle who was the first defendant The first defendant had a daughter who was married to Surayya It was averred in the plaint that the first defendant under the advice of his daughter was making attempts to alienate property belonging jointly to the plaintiff and the first defendant and that in doing so he had granted long term leases to the second defendant in respect of some of the joint family properties That was urged as the ground for the plaintiff, as the adopted son of the first defendant, to ask for partition of his half share and

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* C R. P No. 988 of 1945. 18th January, 1946.

separate possession thereof. The plaint as originally framed was upon this basis and the relief that was asked for was to declare the plaintiff's right to a half share in the plaint schedule property which consisted of one item of wet land measuring an extent of one acre and 12 cents It was also prayed that the property should be divided into two equal shares and that separate possession of one of the shares should be delivered to the plaintiff, and other consequential reliefs by way of future profits, etc, were also asked for. The suit was filed on the 26th June, 1944 The first defendant died in August, 1944, before the service of summons. Thereupon an application was made for bringing on record his widow and daughter and one more alienee as defendants 3, 4 and 5 respectively These were added. Defendants 3 and 4, namely, the widow and daughter, filed a written statement denying the alleged adoption and propounding a will said to have been executed by the first defendant on the 24th August, 1943, by which it was provided by the testator that the rights in his property should pass on his death to his wife (the third defendant) with a life interest and thereafter it should pass to his daughter (the fourth defendant) with absolute rights As a consequence arising from the death of the first defendant and because of the will set up by defendants 3 and 4, the plaintiff felt obliged to seek an amendment of the plaint in order to ask for reliefs appropriate to the altered situation By the amendment he sought to plead that by reason of the first defendant's death the whole of the suit property passed to him according to Hindu Law, that the plaintiff had absolute right to obtain possession thereof and that defendants 3 and 4 had no right whatever to the suit property, the will set up by them and the cowle relied upon by the fifth defendant not being genuine Consequential amendments were also sought in the paragraphs relating to the cause of action and the reliefs prayed for He asked for delivery of possession of the schedule property ejecting the defendants therefrom and an order directing payment of the future profits from the date of the plaint until delivery The application was opposed by defendants 3 and 4 and was, as stated before, dismissed by the learned District Munsiff who dealt with the whole matter after setting out the facts in brief in this way He said:

"To put the whole thing very shortly, the petitioner now wants to convert the suit which was laid on the basis of joint possession into one where possession is sought for, admitting that the plaintiff never had it Such a change, of course, completely alters the nature of the suit and an amendment of this nature cannot be allowed"

He relied for this purpose on the decision of this Court in *Vaithilingam* v. *Natesa*[1].

Before dealing with the decision bearing upon the question, it is necessary to point out that the language of Order VI, rule 17 is, as contrasted with the terms of its predecessor, section 53 (*c*) very wide. The relevant portions of the present rule provide that the Court may at any stage of the proceeding allow either party to alter or amend his pleadings in such manner as will be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties The statutory test therefore is whether the alteration of the pleadings or amendment thereof that is asked for is just or whether it is necessary for the purpose of determining the real questions in controversy between the parties In interpreting and applying this rule the Courts have applied from time to time various tests While it is recognised that, in order to avoid multiplicity of suits and to enable the final determination of all questions arising in the litigation, the rule should be administered in a fairly liberal manner, it has at the same time been emphatically laid down that, under the guise of alteration or amendment of the pleadings, a party should not be allowed to substitute one cause of action for another or to change the subject matter of the suit See *Ma Shwe Mya* v *Maung Mo Hnaung*[2].

In a very early case decided under the old section 53 (*c*) it was pointed out in *Kasinath Das* v *Sadasiv Patnaick*[3], that the restriction contemplated by that section was only as to the nature of the suit; the law prohibits any such amendment as would change the fundamental character of the suit; for example a plaint cannot

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1. (1912) I L R. 37 Mad 529
2. (1921) L.R. 48 I.A 214 · I L R. 48 Cal. 832 at 836 (P.C)
3. (1893) I L R. 20 Cal. 805.

be so amended as to convert a claim based on contract into an action on tort. It was held in that case that an alteration in the relief does not amount to a change in the nature or character of the suit The same idea was put in a forcible way by Baguley, J, in *E. K S. Chettiar Firm* v *Maung Min Maung*[1], a case decided under Order VI, rule 17 thus.

"It will be seen therefore that the one thing which must not be altered by an amendment is the fundamental character of the suit, and I understand that the fundamental character of a suit must refer to the foundation on which it is based It is the foundation on which a suit is based and not the prayer in the plaint that determines its fundamental character"

That was a case where the suit as originally framed was for possession of certain properties which had been hypothecated The purpose of the amendment was to convert the suit into a suit for redemption of the mortgages and it was held by the learned Judge that all that the appellant sought by the amendment was to ask for a different relief based on the same facts and that he left the foundation of his suit entirely unchanged

In *Sultan Abdul Kadir* v *Mohammed Esuf Rowther*[2], where the plaintiff's suit for partition based on exclusive ownership was bound to fail, he was allowed to amend the plaint so as to base his claim on co-ownership I may also refer to the decision of Pakenham Walsh, J, in *Mangammal* v *Rangappa Naicker*[3] There the plaintiff had first sued for an injunction against the defendants restraining them from trespassing on the plaintiff's land She contended that her husband was divided from his brother, the first defendant, 35 years ago and that the suit lands fell to her husband's share and he had been enjoying them until his death and after his death she was in possession and enjoyment thereof The defendants admitted the alleged partition but denied that the property in question ever formed part of the joint family property. Upon this averment of the defendants the plaintiff asked for leave to amend the plaint by basing her title on adverse possession against the defendants for twelve years and asking for a declaration that the suit properties were in her possession for the statutory period and as such belonged to her The amendment asked for was allowed and the learned Judge after referring to some of the decisions bearing on the point found that the amendment justly developed the original cause of action and there was no objection to the amendment. Reliance was placed in that case on *Sultan Abdul Kadir* v *Mohammed Esuf Rowther*[2], already cited and the decision of Jackson, J, in *Somasundara Bhattar* v. *Muthu Thevar*[4]. In the last mentioned case the plaintiff had averred in the original plaint that the impugned sale had been obtained from him when he had just attained majority by imposing upon him; he subsequently applied to alter it by saying that he was actually a minor at the time of the execution. In these circumstances Jackson, J., remarked that there was no objection to an amendment which justly developed the original cause of action The learned advocate for the respondent relied on the decision in *Vaithilingam* v *Natesa*[5], which has been cited in the judgment of the lower Court That was a case where a suit in ejectment was sought to be converted into a suit for partition which by its nature necessitated the bringing into hotchpot of other properties and the adjudication of the various questions relating to all the assets and liabilities of the family, the validity of alienations and other consequential matters That would obviously mean a variation of the fundamental character of the suit and a substitution of the cause of action

It is next contended by the learned counsel for the respondent that the fundamental character of the suit as originally framed has been altered in this case by reason of the amendment and that therefore the amendment was rightly disallowed. His point of view may be put thus. On the filing of the plaint an immediate severance in status was effected in law between the plaintiff and the first defendant. As the result of the death of the first defendant the plaintiff, if he could substantiate his case of adoption, would be entitled to a half share in the property as a coparcener

1. A I R. 1933 Rang 247
2. A I.R 1926 Mad 909
3. (1934) 41 L W. 37
4. A I R 1925 Mad 188.
5. (1912) I.L.R. 37 Mad. 529

with his adoptive father and the other half can be claimed only in the capacity of an heir at law. The original suit was on the basis of his being a coparcener and as such entitled to a partition of his undivided share and separate possession thereof. For that purpose he averred in the plaint that he was enjoying possession of the joint family properties along with his adoptive father. In the amended plaint, however, he claimed, the entire property, half of it necessarily as a coparcener with his deceased father and the other half as his heir ; and for this purpose he alleged that, the entire property being in the possession of the widow and the daughter of the deceased first defendant, possession thereof should be delivered to him. The original plaint was on the basis of joint possession, while the amended plaint is on the basis of the plaintiff being out of possession. In other words, the suit as originally filed was for partition while the amended plaint is for ejectment. This, it is argued, amounts to an alteration of the fundamental character of the suit. It is also pointed out that defendants 3 and 4 having been brought on the record as the legal representatives of the defendant, they can only proceed with the suit as it stood at the time of the first defendant's death, under the provisions of rule 4 (1) of Order XXII and they can raise only such defences as they can in the capacity of legal representatives under sub-rule 2 of rule 4 of Order XXII.

After giving attentive consideration to this argument I am unable to agree that having regard to the nature of the original and amended pleadings there is such variation thereof in the amendment asked for that, in giving effect to the true spirit of Order VI, rule 17, the amendment ought to be refused. Obviously, the necessity for the amendment arose out of circumstances which happened after the filing of the suit, namely, the death of the first defendant The real basis or foundation of the claim in either situation is the alleged adoption. If the adoption is found in plaintiff's favour, he will be entitled to succeed, both with regard to the half share as claimed in the original plaint and with regard to the other half which he claims as heir at law in the amended plaint, provided that the will propounded by defendants 3 and 4 does not stand in his way Much stress is laid upon the fact that while in the first plaint joint possession was put forward, in the amended plaint the case was that the plaintiff was out of possession, and it was urged that he had a motive in altering this part of the case because he wanted to sue *in forma pauperis*. But the kind of possession that was meant when joint possession was claimed along with the first defendant was such possession as an undivided coparcener has in the joint family property when it is under the management of the *kartha* of the family. The plaintiff's case is that defendants 3 and 4 are now in actual physical possession of the entire property. Consequently it was a necessary and just development of his original case that he should ask for possession of the same on the strength of his alleged right of adoption and in doing so I am unable to hold that there is an alteration or variation of the fundamental character of the suit or that it is a case where one cause of action has been substituted for another. There is no new cause of action as the title remains the same and in any case there is no prejudice caused to the defendants.

I would for these reasons allow the revision petition and set aside the order of the District Munsiff and allow the amendment of the plaint prayed for in I A. No. 630 of 1945 in O. S. No. 112 of 1944 on his file.

The question of granting leave to the plaintiff to sue *in forma pauperis* on the amended plaint is left open and will be decided in the Court below on its merits. It will be open to the defendants to file additional written statements in order to raise if so advised, such pleas as may be necessitated by the amendment of the plaint. The petitioner will get his costs here and in the Court below.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Chilukuri Antarvedi Sarma and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), *section* 195 (1) (b) *and* (c)—*Complaint disclosing offences punishable under sections* 193 *and* 471, *Indian Penal Code and also under section* 467, *Indian Penal Code—Complaint of offence punishable under sections* 467 *and* 109, *Indian Penal Code—Cognizability without complaint from Court concerned.*

A promissory note on which a suit was filed was sent to the Government Hand-writing Expert who gave the opinion that the finger-print on the note was not that of the alleged executant and the suit was thereupon dismissed The executant thereupon filed a complaint under section 476 based on these facts It was contended that the complaint disclosed offences under sections 193 and 471, Indian Penal Code, so that the case fell under section 195 (1) (*b*), Criminal Procedure Code, even though the allegations also disclosed an offence punishable under section 467, Indian Penal Code, which is not mentioned in section 195. The objection was overruled on the ground that offences under sections 193 and 471, Indian Penal Code, were minor offences as compared with that under section 467, Indian Penal Code On revision,

Held, that the Magistrate could only try the case as a case under section 467, Indian Penal Code, by ignoring the elements which also bring the case under section 193, Indian Penal Code The complainant could not ignore the offence committed under section 193, Indian Penal Code and ask the Criminal Court to take cognizance of the charge under section 467, Indian Penal Code alone Hence the Magistrate had no jurisdiction to take cognizance of the case without a complaint from the Court concerned

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Stationary Sub-Magistrate of Tenali, dated 3rd November, 1944, and made in P. R. C. No. 11 of 1944.

P. Basi Reddi for Petitioners

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is a petition to revise an order of the Stationary Sub-Magistrate, Tenali, made in P. R C No 11 of 1944, overruling objections to his jurisdiction to take cognizance of an offence punishable under sections 467 and 109 of the Indian Penal Code. A promissory note was brought into existence on the 12th September, 1943, for the principal sum of Rs. 450 which purported to be executed by the complainant in favour of the second accused. It was written by the first accused and attested by the third accused. This promissory note was assigned to the fourth accused, and he issued a registered notice to the complainant demanding the amount due under the promissory note, and on the complainant denying that he had executed the promissory note, filed S C No 15 of 1944, on the file of the Subordinate Judge's Court, Tenali, on the footing of the promissory note. The promissory note was sent to the Government Hand-writing Expert who gave the opinion that the finger-print on the promissory note was not that of the complainant. On that, the fourth accused had the suit dismissed. The complaint now in question was based on the above facts, and it was dismissed as against the fourth accused under section 203 of the Criminal Procedure Code on the ground that the complaint against him could only be given by the Subordinate Judge's Court, Tenali With regard to the other accused, it was argued on their behalf that the complaint disclosed offences under sections 193 and 471 of the Indian Penal Code, so that the case fell within the provisions of section 195 (*b*) of the Criminal Procedure Code, even though the allegations also disclosed an offence under section 467 which is not mentioned in section 195. The Sub-Magistrate overruled the objections on the ground that offences under sections 193 and 471, Indian Penal Code, are minor offences as compared with section 467, relying on a decision of Lakshmana Rao, J, in *Guruswami Chettiar* v *Emperor*[1].

The learned Magistrate has not referred to two decisions of Benches of this Court. *Ravanappa Reddi*, In re[2] and In re *Appadorai Nainar*[3], without reference to

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* Crl R. C. No. 922 of 1944. 22nd March, 1945.
(Cr. R. P No. 864 of 1944).

1. (1940) 2 M.L.J. 1063.
2. (1931) 62 M.L.J. 735 . I.L.R. 55 Mad. 343.
3. (1935) 69 M.L.J. 812 : I.L.R. 59 Mad 165.

which the decision in *Guruswami Chettiar* v *Emperor*[1] cannot be understood. In these two cases it was held that if the facts disclosed an offence under section 193, Indian Penal Code, parties could not be allowed to evade the provisions of section 195 (1) (*b*) of the Code of Criminal Procedure by filing a complaint under another provision of the Indian Penal Code. In *Guruswami Chettiar* v *Emperor*[1], Lakshmana Rao, J., referred to but distinguished *Appadorai Nainar*, In re[2], on the ground that in the case before him there was no question of evading the provisions of section 195 of the Code of Criminal Procedure. The facts of the case were that a pleader had used a forged receipt in the course of proceedings against him under the Legal Practitioners Act. The Court thereafter was moved to make a complaint against the pleader for an offence under section 403 and against the maker and the two attestors of the receipt for an offence under section 467, Indian Penal Code. For reasons that are not material the Court did not think it necessary to make a complaint against the pleader and, as regards the other three respondents, it was also of opinion that a complaint need not be made because they could be prosecuted for an offence under section 467, Indian Penal Code, without a complaint from the Court, and the offence under section 193 which could also be said to have been committed did not require a complaint because as compared with the offence under section 467 it was a minor offence. This decision, as already indicated, was upheld in revision by Lakshmana Rao, J.

In the present case the aggrieved party filed a petition in the Civil Court asking that Court to make a complaint against the four accused and also himself filed a complaint in a Criminal Court. Orders on the petition in the Civil Court do not yet seem to have been passed. In the complaint to the Criminal Court it is true that the object of the forgery is stated to be to force the complainant to come to terms by fabricating documents and again at the end of the complaint to be "to coerce the complainant to part with property." It is not stated in so many words that the object was to use the forged promissory note in any stage of a judicial proceeding. The fact set out, however, clearly disclose that it was intended, if necessary, to use the document in a judicial proceeding even if it was hoped that the existence of the document would force the complainant to come to terms regarding his occupancy rights without resort to the Courts. I am unable to distinguish the facts of the present case from the facts in *Ravanappa Reddi*, In re[3] and In re *Appadorai Nainar*[2]. It is suggested that there is no evasion because the complainant has asked the Civil Court to make a complaint. But it is just here, I think, that there is a distinction between the present case and the case decided by Lakshmana Rao, J. The complainant in the case with which he was concerned asked the Civil Court to make a complaint and was referred to a Criminal Court. There was certainly no question of evasion. But it is not open to the complainant to say that there can be no question of evasion simply because he has *also* asked the Civil Court to make a complaint. The Civil Court might dismiss the application not because it thought that no complaint was required from it but because it did not think it expedient in the interests of justice to make a complaint; and in such circumstances it would certainly be an evasion of the provisions of section 195 simultaneously to press a complaint in a Criminal Court in respect of the same facts.

I have been referred on behalf of the complainant to two cases, one decided by King, J., In re *Muthuvelu Kudumban*[4] and the other by the learned Chief Justice and Chandrasekhara Aiyar, J., in *Nallappa Goundan* v *Chinnammal*[5]. These cases cannot help the complainant. In the first of them, *Ravanappa*, In re[3], was distinguished and in the second In re *Appadorai Nainar*[2]. In re *Muthuvelu Kudumban*[4], King, J., held that a Criminal Court was not debarred from taking cognizance of an offence under section 211, Indian Penal Code, simply because the facts also disclosed a minor offence under section 182, Indian Penal Code, in respect of which

1. (1940) 2 M.L.J. 1063.
2. (1935) 69 M.L.J. 812 : I.L.R. 59 Mad. 165.
3. (1931) 62 M.L.J. 735 : I.L.R. 55 Mad. 343.
4. (1936) 71 M.L.J. 485 : I.L.R. 59 Mad. 1083.
5. (1941) 2 M.L.J. 618.

a special complaint was necessary. But the basis of his decision was that if all the facts were considered the appropriate section of the Indian Penal Code which applied to the offence was section 211. There was thus no question of evading section 195 as in *Ravanappa Reddi*, In re[1], by ignoring the elements of the offence which brought it under section 193 and confining attention to the elements which brought it under section 467 in respect of which no special complaint was necessary. In the present case it is clear that the Magistrate can only try the case as a case under section 467, Indian Penal Code, by ignoring the elements which also bring the case under section 193, Indian Penal Code In *Nallappa Goundan* v *Chinnammal*[2], it was held that a complaint of defamation could be taken cognizance of by a Criminal Court even though the alleged defamatory words were contained in a deposition given in a Civil Court. But here again the case is no authority for the view that a complainant, as in the present case, can ignore the offence committed under section 193 and ask the Criminal Court to take cognizance of the charge under section 467 alone. It was pointed out in *Nallappa Goundan* v. *Chinnammal*[2] that the offence of defamation was entirely different from the offence of perjury, and In re *Appadorai Nainar*[3] was distinguished on the ground that, as in the present case, it was based on a forged instrument which had been given in evidence and which was not in the same category as a charge of defamation which is an entirely personal matter.

For the reasons given I am of opinion that the present case is governed by the decisions in *Ravanappa Reddi*, In re[1] and In re *Appadorai Nainar*[3]. That being so, the Magistrate had no jurisdiction to take cognizance of the complaint. His order is, therefore, set aside; the complaint is dismissed and this petition is allowed.

V.S. *Petition allowed.*

[END OF VOLUME, 1946—I]

1. (1931) 62 M.L.J. 735 : I.L.R. 55 Mad. 343.
2. (1941) 2 M.L.J. 618
3. (1935) 69 M.L.J 812 I.L.R. 59 Mad. 165.

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NOTES OF RECENT CASES

Yahya Ali, J — Chinna Mahali Mudali *v.* Nanjappa Goundan

4th December, 1945. — S A No 2384 of 1944.

Hindu Law—Bequest of properties to four grandsons with direction to divide equally amongst them passing over the son on the ground that he was leading an immoral life—Grandsons if can form joint family when their father was alive—Sale by eldest brother as guardian of two minor brothers and one insane brother—Validity—Status of eldest brother—If that of guardian or manager

A, a Hindu died leaving a will, under which he bequeathed his properties to his four grandsons passing over his son *M* who it was alleged in the will was leading an immoral life The mother of the grandsons was also alive. Two of the grandsons were minors but no direction was given in the will as to any of the legatees or any one else having to act either as executor or as guardian. It was provided by the will that, after the lifetime of the testator, the four legatees should divide and take in equal shares the immoveable properties set out therein *X*, the eldest of the grandsons sold two items of the properties to discharge a mortgage purporting to act for himself and for his three brothers alleging that one of them was insane at the time and the other two were minors As a result of these transactions a piece of valuable garden land was saved for the family free from encumbrance. In a suit by the three younger brothers to set aside the sale,

Held, (1) during the lifetime of *M*, the father, his four sons cannot constitute a joint undivided family. (2) As the testator had indicated that the four legatees should divide and take in equal shares the properties bequeathed, the grandsons took the property in severalty and not as a joint tenancy. (3) *X*, the eldest brother accordingly was not entitled as " manager of the joint family " consisting of himself and his brothers, to make any disposition of the shares belonging to his insane brother or the minor brothers (4) There is no legal warrant under the Hindu Law which would entitle *X* the eldest brother to act as *de jure* guardian of his minor or otherwise disqualified brothers. *X* cannot be treated as the testamentary guardian as there was no such appointment expressly or by implication in the will. (5) The mere circumstance that the father and mother are alive and available would not *per se* render void *ab initio* the acts of a *de facto* guardian so as to deprive the transferee of any title whatsoever to the property alienated by such *de facto* guardian, if as a matter of fact, it appears that the sale itself was for the benefit of the family and for legal necessity and for proper and adequate consideration. (6) No doubt a fugitive or isolated act will not constitute a person a *de facto* guardian but there should be a continuous course of conduct.

[On the facts it was found that *X* was acting as a *de facto* guardian and the sale being one for the family benefit, must be upheld.]

Case-law discussed.

S. Panchapagesa Sastri and *M. R. Narayanaswami* for Appellants.

N Sivaramakrishna Aiyar for Respondents.

K.S.

Kuppuswami Aiyar, J. Talipulamma, *In re*
5th December, 1945. C M P No 5380 of 1945.

Court-Fees Act (VII of 1870), section 5—Revision petition returned for payment of necessary court-fees—Non-payment—Petitioner absent when petition posted and deficit court-fee directed to be paid within two weeks—Finality of order

Civil Procedure Code (V of 1908), section 115—Revision petition by proper party to a suit—Court-fee payable

A revision petition (without the necessary court-fee on the ground that the petitioner was recognised as a pauper in the suit and therefore entitled to file the revision without paying the necessary court-fees) was returned for paying the court-fees. But the petitioner would not pay the same The matter was posted before the Master who passed the following order "The petitioner is called. He is absent The appeal examiner's view is correct Deficit Court-fee will be paid in two weeks" In a petition for directing refund of the Court-fees paid by him in the Revision Petition

Held, that (i) the order of the Taxing Officer was final as the petitioner was absent in spite of notice when the order was made

(ii) The Civil Revision Petition cannot be said to be a proceeding connected with the suit in the same Court and except when proceedings are taken by way of appeal as pauper there is no provision enabling pauper parties to file applications wihtout paying Court-fees.

Petitioner in person

K S

Horwill and Koman, JJ Venkataraya Goundan *v* Nallappa Goundan
5th December, 1945 A A O. No 545 of 1944.

Civil Procedure Code (V of 1908), section 48—Date of decree for purpose of computing limitation for execution

Where the shares of the parties are adjudicated and decided in a partition suit the decision became ripe for execution on the date of the judgment itself The decree though engrossed on stamp paper on a later date must be treated as being of the same date as the judgment for computing limitation for execution of the decree under section 48 of the Code of Civil Procedure

P. R Ramakrishna Aiyar, C K Viswanatha Aiyar and *P R. Vasudeva Aiyar* for Appellant

P. N Appuswami Aiyar and *M. Venkataramana Aiyar* for Respondent

K.S

Rajamannar, J Ramanamma *v* Official Receiver, Kistna
6th December, 1945 A A O No 45 of 1945

Provincial Insolvency Act (V of 1920), section 78 (2), proviso—Proof of debt—What constitutes—Return for production of vouchers or other information—Right to dividend declared before re-presentation.

When a creditor delivers or sends by registered post an affidavit verifying the debt due to him, he must be deemed to have proved his debt. Though the affidavit is returned with a direction to file the copy of the decree passed in respect of the debt and within the time granted it is re-presented, the creditor will be deemed to have proved his debt on the date when he first sent his affidavit and he will be entitled to any dividend declared between the dates of the first presentation and the re-presentation of the affidavit verifying the debt.

A person who has lodged a proof has "proved" within the meaning of the proviso to section 78 (2) of the Provincial Insolvency Act.

B V Ramanarasu for Appellant.

P. Satyanarayana Raju for Respondent

K S.

Bell, J — Palaniappa Chettiar *v* Narayanan Chettiar
10*th December*, 1945 — C R P No 241 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 26, *rules* 2 *and* 4 —*Commission to examine witness—Discretion of Court to order—Principles.*

Where the Court finds that an application for the issue of a commission to examine a witness is an abuse of process filed vexatiously with a view to protract litigation the Court can refuse the application It is a matter of discretion for the Court in the circumstances of each case to allow or refuse an application for the issue of a commission The Court may consider whether the evidence sought to be adduced on commission cannot be adduced save through that particular witness It is necessary for the applicant to show that unless a commission issues to take the evidence of the person desired, it will be impossible to place the necessary and relevant facts before the Court in support of his case

K R Rama Aiyar for Petitioner

R. Rangaswami Aiyangar for Respondent

K S.

Yahya Ali, J. — Ammu Amma *v.* Kelan.
10*th December*, 1945 — S A No. 2368 of 1944

Malabar Tenancy Act (*XIV of* 1930), *section* 20, *clause* (5)—*Failure of landlord to make out claim for eviction under—Landlord cannot fall back on clause* (3) *of the section and claim eviction under that clause*

In a case falling under clause (5) of section 20 of the Malabar Tenancy Act, if one of the requirements of that section is not satisfied, it is not open to the landlord to fall back on clause (3) of section 20 and claim eviction under that clause

A Achuthan Nambiar for Appellants

M Chinnappan Nayar and *M Narayanan Unni* for 1st Respondent.

K S

Horwill and Koman, JJ — Venkata Narasimhan *v* Nagoji Rao
12*th December*, 1945 — C M A Nos 70 of 1945 and 110 of 1945

Civil Procedure Code (*V of* 1908), *section* 105—*Scope—Order setting aside dismissal for default—If can be questioned in appeal*

Where the effect of an order is to prevent an enquiry into merits such an order would come within the scope of section 105 of the Code of Civil Procedure as affecting the case on merits but where the orders do not affect the decision of the case on merits such orders would not come within the scope of section 105 of the Code of Civil Procedure Applying that principle, an order setting aside a dismissal for default, (of an application for setting aside a sale under Order 34, rule 6), as it only reopens an enquiry and does not affect the decision of the case cannot be questioned in an appeal under section 105 of the Code of Civil Procedure

C Rama Rao, N Narasimham and *N Ramakrishnayya* for Appellant in C M. A. No 70 of 1945

P Somasundaram for Respondent in C. M A No 70 of 1945

P. Satyanarayana Rao for Appellant in C. M. A No. 110 of 1945

P Somasundaram and *D Narasaraju* for Respondents in C M. A. No 110 of 1945.

K.S.

Chandrasekhara Aiyar, J Venkanna *v* Venkatanarayana.
12th December, 1945 S A No. 1620 of 1944.

Hindu Law—Reunion—Burden of proof—One of the reuniting coparceners not having any property—Validity of reunion

A re-union under Hindu Law has to be specifically proved by the party who sets it up and it cannot be inferred merely from joint living and joint management

Whether or not there could be a re-union between two divided coparceners without possession of any properties whatever by them, (they having for example lost the properties taken by them at the prior partition) where one of the divided coparceners has got wealth, effects or properties and the case is that he has re-united with another coparcener (with whom a re-union can validly take place) who may bring no properties of his own to the joint stock, the requirement of the Mitakshara for a valid re-union is satisfied because what was divided previously is again treated as the joint property What the texts require is that divided wealth should again be regarded as joint common wealth It is not essential that there should be wealth and effects brought on each side into the common pool

[Leave to appeal granted]

P Satyanarayana Rao and *B V Subramaniam* for Appellant.

V Govindarajachari and *V Parthasarathi* for Respondent.

K S

Yahya Ali, J Venkatasubba Rao *v.* Jagannadha Rao
18th *December,* 1945 C R P. No 541 of 1945.

Civil Procedure Code (V of 1908), *section* 2 (11)—*Legal representative—Hindu widow entitled to interest in husband's property under Hindu Women's Rights to Property Act (XVIII of* 1937)—*If a " legal representative " entitled to be brought on record*

A Hindu widow taking an interest in her husband's estate which devolves upon her under the Hindu Women's Rights to Property Act, would be his " legal representative " within the meaning of section 2 (11) of the Code of Civil Procedure, and is as such entitled to be brought on record as a person who in law represents the estate of her deceased husband

V Viyyanna for Petitioner

V Prakasamma for Respondent

K S

Yahya Ali, J Ayiri Parambil Chozhi *v.* Parameswaran Nambudri
18*th December,* 1945 S A No 1750 of 1944, etc

Malabar Tenancy Act (XIV of 1930), *section* 20 (5)—*Applicability—Dewaswom as landlord if can evict tenant on the ground that it requires the property for its own cultivation*

The idol according to Hindu Law, is a juristic entity who can hold property and enjoy the same If it can do so, it can lease out its properties or can cultivate its own properties, the only disability being that being virtually in the position of a disabled person it has necessarily to exercise its acts of management or administration through an agent, *viz*, the trustee The trustee whether it be of a private or public trust is competent to declare on behalf of the idol of which he is the duly constituted trustee that a certain property belonging to the idol is required for cultivation on behalf of the idol and sue as jenmi for eviction of the tenant under clause (5) of section 20 of the Malabar Tenancy Act

P Govinda Menon for Appellant

D. H Nambudiripad for Respondent.

K.S

Wadsworth, J. — Narannaidu *v.* Gangunaidu.

17th December, 1945. — S.A. No. 1726 of 1944.

Madras Agriculturists' Relief Act (IV of 1938), *section* 10 (2) (*i*)—*Applicability—Mortgage with provision that for the interest accruing due at the rate of Re.* 0-8-0 *per cent. per mensem the mortgagee was to be in possession and enjoyment of wet lands estimated to yield an income equal to the interest and the quit rent due on the land—If falls under section* 10 (2) (*i*) *of the Act.*

A mortgage after reciting that under a compromise of a previous litigation Rs. 2,500 was due from the mortgagors went on to say: "For discharging the sum of Rs. 150, the same being the interest accruing due per year on the above amount at the rate of Re. 0-8-0 per cent. per mensem, we have delivered to you possession of the wet land we have in the above-said village, after fixing therefor a cist of Rs. 160-5-0 per year. Hence you should as you please carry on cultivation, etc, in the said land and out of the cist of Rs. 160-5-0 due every year therefor you should give credit for Rs. 150 being the interest accruing due on the principal amount due from us to you, and as regards the balance of Rs. 10-5-0 you should on our behalf pay the same towards the quit rent and land cesses payable every year in respect of these lands".

Held, though the mortgage recites a rate of interest, it does not stipulate any rate of interest as due to the mortgagees. What is called "cist" in the mortgage is nothing more than an estimate of the profits which will be realised by the cultivation of the land. Accordingly such a mortgage falls under section 10 (2) (*i*) of Madras Act IV of 1938 and can be redeemed on payment of the principal of Rs. 2,500.

(1943) 1 M.L.J. 419, applied.

E. Venkatesam for Appellants.

P. Somasundaram for Respondents.

K.S.

Wadsworth, J. — Guruvulu *v.* Suryanarayana.

20th December, 1945. — S.A. No. 2315 of 1944.

Mortgage—Khandagutta *deed providing for recovery of possession of the land from the mortgagee at the end of* 57 *years on the basis that the advance would have worked itself out by adjustment of the estimated annual produce —Property if can be redeemed before the expiry of that period.*

A *Khandagutta* deed provided that the mortgagor was entitled to recover possession of his land from the mortgagee at the end of 57 years on the basis that by the adjustment of an amount of Rs. 19 each year representing the estimated value of the produce, the advance would by that time have worked itself out.

Held: The contract contemplates that the mortgagee shall himself discharge the mortgage by annual adjustments of an agreed amount. Until the mortgage has been so discharged there is no right on the part of the mortgagor to recover possession and the mortgagor cannot claim a right to pay down the amount at any time and redeem the mortgage.

B. Jagannatha Das for Appellants.

P. Somasundaram for Respondents

K.S.

Chandrasekhara Aiyar, J.
20th December, 1945.

Eramutti *v.* Pragi Sait.
S.A. No. 2173 of 1944.

Trust—Alienation of trust property by previous trustee falsely asserting that properties belonged to him—Subsequent de facto *trustees if can sue to recover possession in the absence of* de jure *trustees.*

Persons claiming to be *de facto* trustees cannot bring a suit in the absence of *de jure* trustees for the recovery of possession of property wrongfully alienated by the previous trustee who falsely asserted that the properties belonged to him.

(1938) 2 M.L.J. 663 and (1944) 1 M.L.J. 35, followed though doubted.

I.L.R. 1945 Mad. 250. (1944) 2 M.L.J. 326 distinguished.

K. P. Ramakrishna Aiyar for Appellant.

N. Gopala Menon for Respondents.

K.S.

Horwill and Koman, JJ.
21st December, 1945.

Venkataratnam *v.* Prasada Rao.
A.A.O. No. 434 of 1944.

Contract Act (*IX of* 1872), *section* 63—*Principle of if applicable to a decree—Decree-holder exonerating three out of four judgment-debtors in consideration of their paying him a certain amount and reserving his right to proceed against the fourth—Transfer of decree to a stranger—Right of transferee to execute the decree for the balance against the fourth J. D.*

X obtained a decree for Rs 15,508-8-1 against *A*, *B*, *C*, and *D*, the liability of *C* being limited to Rs. 3,297-10-0 *X* accepted a sum of Rs. 3,300 from *A*, *B*, and *D* exonerating them from all liability for the remainder and expressly reserving his right to proceed against *C* for the sum of Rs 3,297-10-0. The decree was sought to be executed against *C* for Rs. 3,297-10-0 by *Y*, the transferee of the decree. *C* contended that by accepting a sum of Rs 3,000 from *A*, *B* and *D* in discharge of the decree, *C* himself became exonerated from all liability on a principle analogous to that found in section 63 of the Contract Act.

Held: The case did not fall under the mischief of section 63 of the Contract Act and as *X*, the decree-holder, expressly reserved his right to proceed against *C* for the sum due by him under the decree, *Y* was not debarred from executing the decree for the balance against *C*.

A.I.R. 1931 Bom. 123 and I.L.R. 1941 (2) Cal. 237, distinguished.

K. Kottayya for Appellant.

K. Kameswara Rao for Respondent.

K.S.

Rajamannar, J.
26th December, 1945.

Parvathi *v.* Kunhan Menon.
S.A. No. 1821 and
A.A.A.O. No. 307 of 1944.

Malabar Tenancy Act (*XIV of* 1930) *as amended by Act* (*XXIV of* 1945)—*Section* 20 (5)—*Scope—Landlord's right to recover possession of the land under—Proper ground.*

Where a holding subject to a lease was purchased by a stranger in discharge of a debt due to her and the stranger sought to evict the tenant on the ground that her sons were unemployed and that she could have the lands cultivated more profitably by her sons rather than by leasing them out, it cannot be said that she "needs the holding *bona fide* for the purpose of raising crops or other produce fo

her own maintenance or that of any member of her family " as provided for in sub-section (5) of section 20 of the Malabar Tenancy Act as amended by Act (XXIV of 1945). Where pending a second appeal by the tenants against decree ejecting them the amedment has come into force, the amendment applies to the proceedings and the tenant in such a case cannot be evicted under section 20, clause (5), as amended.

C. Unnikanda Menon for Appellant.

D. A. Krishnavariar for Respondent.

K.S.

Kuppuswamy Ayyar, J. Perayya, *In re*

7th January, 1946. Cr.R.C. Nos. 574 and 575 of 1945.

(Cr.R.P. Nos. 533 and 534 of 1945).

Madras Gaming Act (III *of* 1930), *section* 5—*Warrant for search issued under—Presumption of validity—Failure of Magistrate to state what the materials were on which the Magistrate came to the conclusion that a warrant should be issued in the case—Effect.*

A search warrant purporting to be issued under section 5 of the Gaming Act cannot be said to be invalid merely because of the fact that what the information was on which the Magistrate was asked to issue the warrant was not stated therein. A Magistrate should be presumed to know the law and also must be presumed to have known what the requirements are before he could issue the warrant. Section 5 of the Gaming Act does not state that the Magistrate should record what the materials were on which he was asked to issue the warrant or whether he believed them to be true or not. The presumption is that the Magistrate would not have issued the warrant under section 5 unless he had been satisfied on the information supplied to him that it was necessary to issue the warrant. If the warrant is presumed to be valid then the other presumption naturally follows under section 6 of the Gaming Act that the place was used as a common gaming house and the persons found therein were there present for the purpose of gaming. The presumption will be enough to justify a conviction.

A. Bhujanga Rao for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. Narayandoss, *In re.*

9th January, 1946 Cr. A. No. 626 of 1945.

Hoarding and Profiteering Prevention Ordinance (*XXXV of* 1943), *section* 6—*Landed cost—Computation for fixing ceiling price—Interest on advance and cable charges cannot be included in "landed cost"*—Bona fide *inclusion of such items in calculation—Effect on sentence—Absent proprietor of business—Liability for offence by servant.*

The landed cost will only include the price paid, the freight and other duties paid and cannot include the interest on the amount advanced originally and the cable charges.

Even if the proprietor of the business was not present at the sales in contravention of the Hoarding and Profiteering Order, he will be liable for the sale of an article by his clerk at an excess price.

A.I.R. 1945 Lah. 238 and Cr. A. 378 and 379 of 1945, followed.

Where however the clerk who made the calculations as to landed cost included the interest and cable charges in the *bona fide* belief that such charges could be

included and the sale price was not in excess of the landed cost by more than twenty per cent. an exemplary fine is not called for.

K. V. Ramaseshan for accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
11th January, 1946.

Janarthana Goundan, *In re.*
Cr. R. C. No. 1001 of 1945.
(Cr. R. P. No. 935 of 1945).

Defence of India Rules (1939), *rule* 34 *and rule* 39 (2) (*b*)—*Prejudicial literature found at the time of police search in a locked bureau* (*the key of which was with one of four Hindu undivided brothers*) *in an engine shed adjoining the house belonging to the family—Inference as to possession of the literature by other brothers—If permissible.*

Where at the time of police search in an engine shed in the house belonging to the family of four undivided brothers, some prejudicial literature is found in a locked bureau, the key of which was with the second brother who was in management and the elder brother only went occasionally to the village, the elder brother cannot be said to be in occupation of the portion of the house where the prejudicial literature was found and he cannot be convicted of an offence under rule 39 (2) (*b*) of the Defence of India Rules.

I.L.R. 1945 Mad. 233, distinguished.

J R. Gundappa Rao for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
15th January, 1946.

Ramaratnam, *In re,*
Cr. R. C. No. 1169 of 1945.
(Cr. R. P. No. 1085 of 1945).

Criminal trial—Charge of sedition—Trial by sessions with jury—Grounds for directing.

Though the law has not made a case of an offence under section 124-A of the Penal Code triable exclusively by a Court of Session, where the article in a widely circulated newspaper alleged to be seditious is in Tamil, a trial of the case with the aid of a jury will be advantageous not only from the point of view of the accused but also from the point of view of the prosecution. The main considerations which ought to weigh in deciding such matter are :—

(1) The advantages of a trial by a High Court with the aid of a jury which would be in a position to know the language and appreciate the significance of the article, its implications and its effect on the general public and the readers' reaction to it;

(2) The adequacy of the sentence that may be passed by the Court for the offence in question ; and

(3) The capacity of the judge to appreciate the impression that is likely to be formed in the minds of the reading public.

I.L.R. 53 Bom. 611 and I.L.R. 56 Bom. 61, referred to.

Sir Alladi Krishnaswami Aiyar with *T. M. Kasturi* and *N. Rajagopala Aiyangar* for the Petitioners.

The Crown Prosecutor (*P. Govinda Menon*), on behalf of the Crown.

K.S.

Yahya Ali, J.
14th December, 1945

Kallalagar Devasthanam, Madura *v* Karuppa Pillai.
S.A. Nos 2098 and 2099 of 1944.

Landlord and tenant—Water charges—Right to claim—Water from Periyar dam passing through course on the inside of the old bund of a disused tank into lands in possession of defendants—Remnants of the tank bed registered as ryoti land and assessed to rent—Effect.

At one time a tank in a village belonging to the plaintiff comprised a large extent and had a bund of considerable size with a sluice and other arrangements for irrigation After the erection of the Periyar dam supply from that source was provided In consequence a considerable portion of the tank was assigned for wet cultivation leaving a portion of the old bund and sluice without shutters. The portion was registered as *ryoti* land of the plaintiff and assessed to rent The Periyar water passed through the course on the inside of the old bund and flowed out through the unshuttered hole in the sluice and irrigated the lands in the occupation of the defendants In a claim by the plaintiff for water charge for the second crop raised on the lands in the occupation of the defendants,

Held : The right to levy water charges of this description rests on the principle that the *solum* of the surface from which water is supplied vests in the landholder *qua* landholder. The land having been converted into *ryoti* land and assessed to rent the very foundation on which water charges can be levied disappears.

(1940) 1 M L J. 160, distinguished.

C Rangaswami Aiyangar and *P. N Marthandam Pillai* for Appellant.

A V. Narayanaswami Aiyar for Respondent

K S.

Wadsworth and Rajamannar, JJ.
18th December, 1945.

Nachiappa Chettiar *v.* Muthukaruppa Chettiar.
Appeal No. 239 of 1944

Civil Procedure Code (*V of* 1908), *section* 16 (b)—*Hindu joint family carrying on business and owning immoveable property in Ceylon—Suit for partition in British India in respect of such assets—Not maintainable—Law applicable to transfers of immoveable properties.*

A Court in British India has no jurisdiction to entertain a suit for partition of immoveable property situate outside British India (for instance, in Ceylon) The British Indian Court has no judisdiction even to declare that the properties in dispute were partible joint family properties

A capacity to alienate immoveable properties by will is governed by the *Lex Situs.*

V. Ramaswami Aiyar for Appellant.

The Advocate-General (*K. Rajah Aiyar*), *R Rangachari* and *S. Thyagarajan* for Respondents.

K.S.

Rajamannar, J.
20th December, 1945.

Palaniappa Chettiar *v.* Sadasivan.
S A No. 148 of 1945.

Provincial Insolvency Act (*V of* 1920), *sections* 28 (6), 39 *and* 44—*Scope—Rights of secured creditor—Nature of—Right to personal decree against insolvent for entire balance due after realising security.*

The debt of a secured creditor is not provable until he has realised his security or has abandoned it or valued it. Until one of these events has happened there is

no debt provable in the insolvency proceedings A secured creditor is not affected by the proceedings in insolvency unless his debt was provable in insolvency Any composition scheme to which he was not a party would not be binding on him to any extent and he is entitled not only to the benefit of the security but to a decree for the entire balance that may remain after crediting the proceeds of the sale of the secured properties to be recovered from the insolvent personally and from family properties in the hands of his sons His right is not limited to the rate fixed for payment of creditors in the composition

I L R (1942) Mad 448, relied on, I L R 48 Mad. 521, distinguished ; and (1941) 2 M L J 690, not followed [Leave granted]

S. Jagadisa Aiyar for Appellant.

S. Panchapakesa Sastri, N T Raghunathan, S Desikachari and *N. T Ramanujam* for Respondents

K S

Yahya Ali, J. Subramania Iyer *v* Sankuppan.
4th January, 1946 C R P. No 180 of 1945.

Limitation Act (IX of 1908), *Article* 85—*Applicability—Overdraft account—Insolvency of customer—Effect—If operates as a termination of the account and as a cessation of its mutual, open and current character.*

The mere intervention of bankruptcy of a debtor is not by itself a reason to deny either mutuality or openness or currency to an account which was a mutual, open and current account upto the date of the insolvency in respect of an overdraft account with his creditor Having regard to commercial practice, one would imagine that some pecuniary limit would have been fixed and possibly also a period of time during which the overdraft would be current If such an overdraft was sanctioned it would in the ordinary circumstances be open to the customer to continue to operate on the account within the sanctioned limits, subject to the conditions attached to the overdraft, unless the person who represented the estate of the customer after his adjudication in insolvency, by an overt act put an end to the overdraft and closed the account by striking a balance and making a demand Insolvency by itself does not terminate the overdraft account.

C. S Vidyasankaran for Petitioner.

D. A Krishna Variar for Respondent.

K.S

Horwill and Koman, JJ Srinivasachariar *v.* Seshadri Iyengar.
9th January, 1946 A A O No 684 of 1944.

Indian Soldiers (Litigation) Act (IV of 1925), *sections* 6 *and* 10—*Scope—Junior member of Hindu Joint family managed by his elder brother serving in the army—Sale of property of family in execution of decree—When can be set aside*

Where a junior member of a Hindu joint family which was managed by his elder brother is serving in the army overseas and the family properties are sold in execution of a decree, the Court has power by virtue of section 10 of the Soldiers (Litigation) Act to set aside the sale at the instance of the soldier if it is of opinion that it is necessary in the interests of justice to do so But section 6 of the Act permits the Court to refrain from suspending the proceedings if the interests of the soldier are identical with those of any other party and adequately represented by such party. Accordingly where the sale in execution is confirmed after dismissing

the application of the soldier to suspend it and it is found that his elder brother as manager of the joint Hindu family adequately represented the soldier in the proceedings the sale cannot be set aside under the Act.

C Rajagopalachari and *M E Rajagopalachari* for Appellant

K Krishnaswami Aiyangar and *N C. Raghavachari* for Respondents.

K S

Koman, J. Jagannatha Rao *v* Manickyamma.

11th January, 1946 C R.P No 1464 of 1944.

Civil Procedure Code (V of 1908), *Order* 9, *rule* 9—*Vakil asking for adjournment and expressing his inability to go on as papers had been taken away from him—Refusal of adjournment and subsequent dismissal of suit—Dismissal is one for default which can be set aside under Order* 9, *rule* 9

Where a vakil asked for an adjournment and expressed his inability to go on as the papers had been taken away from him, he could not be said to have any more authority or instructions to appear in the suit. When the suit is afterwards dismissed, the dismissal is one for default and an application under Order 9, rule 9, of the Civil Procedure Code to set it aside would lie.

Y. Suryanarayana for Petitioner.

G Chandrasekhara Sastri for Respondent.

K.S.

Yahya Ali, J Vanjiya Goundar *v* Venkatachala Naicker.

11th January, 1946. C R P. No 880 of 1945.

Execution—Question of limitation—Failure to raise at earlier stage—Not a bar to its being raised at a later stage of the execution proceedings

Having regard to section 3 of the Limitation Act it is open to a judgment-debtor to raise the question of limitation in an execution petition at a later stage, although it was not raised at the earlier stage I L R 58 All 313 (F.B), relied on

The fact that by reason of the question not being raised at an earlier stage the decree-holder was put to expense and inconvenience is a matter bearing only on the question of costs.

T. P. Gopalakrishnan for Petitioner.

T R. Srinivasa Aiyar for Respondent.

K.S

Kuppuswami Ayyar, J. Kunju Iyer, *In re.*

16th January, 1946. Cr.M.P. No. 1211 of 1945.

Criminal Procedure Code (V of 1898), *section* 403 (1)—*Conviction by trial Court for offence punishable under section* 409 *of the Penal Code—Acquittal on appeal on the ground that facts alleged did not constitute offence under section* 409 *with a direction to frame charge under section* 420, *Penal Code—Proceedings for offence under section* 420, *Penal Code, not barred by section* 403 (1), *Criminal Procedure Code.*

The accused was convicted by the Joint Magistrate for an offence punishable under section 409 of the Indian Penal Code On appeal, however, the Sessions Judge being of the opinion that the facts alleged did not constitute an offence under section 409 of the Penal Code acquitted the accused but directed the papers to be sent to the lower Court for a charge being framed under section 420, Penal Code and evidence being let in On a petition to quash the proceedings,

Held, there was no fresh prosecution or a fresh trial which alone is prohibited by section 403 of the Code of Criminal Procedure The appellate Court merely corrected the error of the first Court and in exercise of the power under section 237

of the Code of Criminal Procedure directed that the alternative charge should be inquired into and section 403 is no bar to it

70 M L J. 635 (F B), distinguished.

T. M. Kasturi for Petitioner.

The Assistant Public Prosecutor (*A. S Sivakaminathan*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. Ramaswami Nadar, *In re.*
17th January, 1946. Crl. App. No. 812 of 1945.

Criminal Trial—Sentence—Conviction of postman for forgery of payees' signatures in money orders and misappropriation of the amount—Sentence should run concurrently as forgery was for the very purpose of misappropriation.

Where the accused, a postman was convicted of forging the signatures of the payees in three money-orders and misappropriating the amounts, as the forgeries were for the very purpose of committing the misappropriation the sentences for the two offences should run concurrently Further the sentences for the offences in respect of the different money-orders must also run concurrently as they all formed part of the same transaction.

A sentence of imprisonment in default of payment of fine must run consecutively and independently.

K. S. Sankararaman for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. Palaniswami Goundan, *In re.*
18th January, 1946 Crl. M. P. No. 1300 of 1945.

Criminal Procedure Code (*V of* 1898), *Section* 170—*Laying of further charge sheets—Power of investigating officer.*

If a police officer after he lays a charge, gets information, he can still investigate and lay further charge sheets. Accordingly a police officer who had filed a charge sheet in which he has not laid a charge against one of several persons against whom information was received by him at the earlier stage of investigation, could file a further charge sheet against that person without disclosing that he had received any further information

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. Manicka Mudaliar, *In re.*
24th January, 1946. Cr. R. C. No. 934 of 1945.
(Cr R. P. No. 874 of 1945).

Madras Traffic Rules—Rule 8 (a) *and* (b)—*Scope—Prohibition against overtaking of vehicles—Limits*

In rule 8 (*b*) of the Madras Traffic Rules a " vehicle " the overtaking of which in the vicinity of a bend or corner or other obstruction in the road means only a vehicle that is moving and not a vehicle that is parked. Where there is nothing to indicate that the driver of such overtaking vehicle could have apprehended causing any inconvenience or danger for other traffic before he overtook the parked vehicle there is no contravention of rule 8 (*a*) either

K. V. Ramaseshan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J Kempamma *v* Racha Setty.
9th January, 1946 S A No 143 of 1945.

Limitation Act (IX of 1908), *section* 20—*Payment by mortgagor towards mortgage debt—Effect—When starts fresh period of limitation as against an item of the mortgaged properties which had been alienated before such payment*

Where a mortgagor after alienating one of the four items but while still in possession of the remaining three items of mortgaged properties makes a payment to the mortgagee, a fresh period of limitation would start in favour of the mortgagee as against all the items of mortgaged properties including the one which the mortgagor had alienated before his making the part payment

I L R (1940) Mad 872, (1940) 1 M L J. 766 (F.B), (1941) 2 M L J 913 and (1943) 1 M L J 185, referred to.

P N Appuswami Aiyar for Appellant.

Respondent not represented.

K S

Lakshmana Rao, J. Samba Sundara Rao *v.* Veeraswami.
21st January, 1946 S A No 2428 of 1944.

Madras Estates Land Act (I of 1908) *(as amended by Third Amendment Act,* 1936), *section* 6 (1) *and* (2)—*Lease of mango grove on land reserved by the owner for raising mango grove—If confers right of occupancy on the lessee—Character of such land.*

Where land is *bona fide* reserved for raising a mango grove and mango trees have been planted on it, and the grove is leased out with a condition that the lessee should plant new plants, tend them and keep the garden in tact, section 6 (2) of the Madras Estates Land Act, as amended by the Madras Estates Land (Third Amendment) Act of 1936, places such land on a par with waste land let under a contract for the pasturage of cattle and land reserved *bona fide* for forest let under a contract for temporary cultivation with agricultural crops and provides that by reason only of such letting or temporary cultivation such land will not become ryoti land. As such land does not become ryoti land section 6 (1) of the Estates Land Act as amended by the Third Amendment Act of 1936, will not apply to those lands and the lessee is not entitled to claim a permanent right of occupancy in the mango grove so leased.

K. Kameswara Rao, P. Satyanarayana Rao, Ch Raghava Rao, V Govindarajachari, V. Subramanyam and *P. Sivaramakrishniah* for Appellant

K. Subba Rao for Respondent.

K.S.

Happell, J. Atma Ram *v.* Chengodi Sita Ramaswami.
24th January, 1946. A. A. A. O No. 120 of 1945.

Provincial Insolvency Act (V of 1920), *sections* 65 *and* 56 (4)—*Official Receiver by gross negligence though* bona fide *paying dividend to a person falsely representing himself to be a creditor—Application by real creditor for directions to the Official Receiver to pay his dividend —Power of Court to allow—Separate suit—If essential.*

Where an Official Receiver pays a dividend to one who impersonates a creditor and the real creditor subsequently applies to the insolvency Court for directions to the Official Receiver to pay the amount of dividend due to him, it

cannot be said that the creditor should necessarily be referred to a suit. The Court has power to direct payment of the dividend to the real creditor when it is found that the Receiver was guilty of gross negligence in paying the amount to a wrong person though he acted *bona fide* in making the payment.

B. V. Subramanyan for Appellant.

K Venkatarama Raju for Respondent.

K S

Wadsworth, J. Ramakrishnaraju *v* Maharajah of Pithapuram.

26th January, 1946. A. A. A O No. 341 of 1944.

Madras Agriculturists' Relief Act (*IV of* 1938), *section* 15—*Payments towards arrears of rent by a tenant under Madras Estates Land Act—Appropriation for future local and road cesses—Propriety—Effect on ryot's right to wiping off arrears of prior faslis.*

The total amounts due for the cist (from a pattadar under the Madras Estates Land Act) for the whole year was Rs. 974-4-8, the water-rate was Rs 15-9-0, the local cesses were Rs 46-6-5 and the educational cess Rs 7-11-9 making up a total of Rs 1,045-15-10 and the *kistbandi* dates were 1st September, 1st October, 1st November and 1st December. The payments made by the pattadar were . On 29th September, 1937, that is to say, nearly a month after the first instalment fell due, he paid Rs 100 which was appropriated towards the cist On 22nd October, 1937, he made a payment of Rs. 332-2-0 in respect of which he was given a receipt indicating an appropriation towards rent and cesses, but without any particulars regarding the amount appropriated to each head In the landlord's books the whole of the water-rate and the whole of the local cess and the whole of the education cess for the year (including instalments not yet due) were treated as discharged and the balance of Rs. 265-6-10 was appropriated towards the cist On this date the amount which had accrued due for local cess was only Rs. 23-3-3 out of Rs. 46-6-5. The excess of Rs 23-3-2 was therefore appropriated to a claim for local cess which had not yet accrued due Similarly the appropriation towards the education cess was a sum of Rs 7-11-9 instead of Rs. 3-13-10 which alone was due. The effect of these appropriations was to reduce the amount available in discharge of the arrears of rent proper then due by approximately Rs. 27. After these payments there were numerous other payments in respect of each of which a receipt was given as for payment towards cist and there was no reference to cesses in any of these subsequent receipts Just before the last date for making payments towards fasli 1347 under section 15 of Madras Act IV of 1938 a payment of Rs. 5-8-0 was made which was adjusted towards the arrears for the next fasli 1348 in contravention of the provisions of section 15 (3) of Madras Act IV of 1938.

Held, the payment for October, 1937, was made towards the arrears then due under rent and cesses and the landlord had no right to keep a portion of that payment unappropriated with a view to its adjustment against future arrears of cesses only. The arrears in respect of fasli 1347 due from the ryot must on a proper appropriation be deemed in the circumstances to be an arrear relating to cesses and the ryot is entitled to the cancellation of all the arrears of rent for the earlier faslis inclusive of any arrears in respect of cesses for those earlier faslis.

V. Govindarajachari and *V Parthasarathi* for Appellant.

Ch. Raghava Rao for Respondent.

K.S.

Koman, J. Rami Reddi *v.* Seshamma.
22nd January, 1946. C. R. P. No. 899 of 1945.

Hindu Law—Suit against widow on promissory note executed by her in renewal of a prior promissory note executed by her husband—Decree against estate of husband in the hands of the widow—If can be passed

In a suit filed against a Hindu widow on a promissory note executed by her in renewal of a prior promissory note executed by her husband a decree against her husband's estate in her hands can be passed as the debt was originally incurred by her husband.

Mayne's Hindu Law, 10th Edition page 782 paragraph 646 and 68 M. L J. 643, relied on.

G. Balaparameswara Rao for Petitioner.

Respondent not represented.

K.S.

Koman, J. Boyyanna *v* Kristappa.
22nd January, 1946. A. A A O. No. 43 of 1945.

Civil Procedure Code (V of 1908), *section* 151—*Execution sale—Court misled into fixing low value by fraud practised and misrepresentation made by decree-holder—Inherent power of Court to set aside sale even after its confirmation—Limitation Act (IX of* 1908), *Article* 166—*Not applicable.*

Where it is found that the Court was misled into fixing a low value (for the property sold in execution), by the fraud practised and misrepresentations made by the decree-holder the Court is competent to set aside the sale under its inherent powers even after it has been confirmed.

I.L.R. 20 Lah. 103, I L.R. 30 Cal. 142 and I L.R 25 Bom. 337, relied on.

The fact that the judgment-debtor took no steps at the time of settlement of the proclamation or subsequently till after confirmation of sale to challenge the valuation given by the decree-holder or to raise objections to the sale is not material.

(1945) 2 M.L.J. 229 (P C.), referred to.

Article 166 of the Limitation Act has no application to such a case.

(Leave granted).

K. Subba Rao and *C. Kondiah* for Appellant.

P Chandra Reddi and *K Venkataratnam* for Respondent.

K.S.

Happell, J. Kuppuswami Padayachi *v.* Vadivelu Padayachi
23rd January, 1946. A. A. A. O. No. 117 of 1945.

Limitation Act (IX of 1908), *Article* 182 (5)—"*Step-in-aid*"—*Application for payment out of amount standing to credit of opposite party in another suit payable to the decree-holder under a compromise decree—If a "step-in-aid."*

A compromise decree provided for payment to the decree-holder of an amount standing to the credit of the opposite party in a different suit on the file of another Court. An application was made by the decree-holder for payment out of the amount which was opposed by the judgment-debtors. In a subsequent application for execution,

Held, as a judicial order (and not a mere administrative order) was necessary for payment out in the prior application that application constituted a step-in-aid of execution which will save limitation.

48 M L.J. 506, distinguished.

K. S. Desikan for Appellant

S. Sitarama Aiyar and *S. Rajaraman* for Respondents.

K.S.

Wadsworth, J. Muttayya *v.* Rajalakshmi Venkayamma Rao.
25th January, 1946. A. A. A. O. No. 350 of 1944.

Madras Agriculturists' Relief Act (IV of 1938), *section* 15—*Purchaser of a portion of a joint holding with the knowledge of the landholder—If constituted separate* pattadar *of his portion—If can claim relief under section* 15 *of Madras Act (IV of* 1938) *by paying only his portion of the rent for faslis* 1347 *and* 1346.

The mere fact that a person purchased a portion of a joint holding with knowledge of the landholder, will not constitute such person a separate *pattadar* in respect of that portion. The holding remains joint and is in its entirety liable for the whole of the rent. The purchaser of the portion cannot get relief under section 15 of Madras Act IV of 1938 by paying only that portion of the rent of the holding for faslis 1347 and 1346 which is due on the land in his enjoyment.

D. Munikanniah and *N. R. Amirthalingam* for Appellant.

D. Narasaraju for Respondent.

K.S.

Happell, J. Kalliani Amma *v.* Vasudevan Nambudri.
25th January, 1946 A. A. A O. No 155 of 1945.

Malabar Tenancy Act (XIV of 1930), *sections* 2 (3) *and* 33—*Tenant erecting another building in the compound—If entitles him under section* 33 *to purchase the landlord's right in the kudiyiruppu.*

The Malabar Tenancy Act does not apply to property which consists of a building owned by a landlord and the site thereof within the meaning of section 2 (3) of the Act. The mere fact that the tenant has erected another building in the compound cannot take the property out of the scope of section 2 (3) of the Act. The tenant or his assignee of his interest cannot have the right to purchase the *kudiyiruppu* rights of the landlord without proving that the original building had been removed or that he had permission to remove it and erect a new building.

(1945) 2 M L J. 471, distinguished

D. A. Krishna Variar for Appellant.

D. H. Nambudiripad for Respondent.

K.S.

Yahya Ali, J. Chenchu Reddi *v* Narasiah.
25th January, 1946. S. A. No 1007 of 1945.

Provincial Insolvency Act (V of 1920), *section* 37—*Principle of, is applicable to case of absolute order of discharge—Property reverts to the debtor.*

The principle of section 37 of the Provincial Insolvency Act extends and can be applied to cases of absolute order of discharge . Unless there is a direction by the Judge at the time of making the order of discharge vesting the property in some appointee the property would revert to the debtor subject to such conditions as the Court may in writing declare

(1942) 2 M L.J. 714, relied on.

P. Chandra Reddi for Appellant.

K N. Arunachala Aiyar for Respondent

K.S.

Bell, J. Subbaratnam Setty *v.* Venkataraghaviah.
28th January, 1946. C R P No 816 of 1945.

Promissory note—Mother renewing prior promissory note after son becoming major—When binding on the son.

Where a person even after becoming a major permits his mother to manage his affairs and the mother renews an earlier promissory note stating herself to be "the guardian of her minor son," it may be considered that the son authorised his mother to execute the promissory note in renewal of the previous liability and a decree can be passed against the son.

I.L.R. 18 Mad 456, applied.

C V Narasimha Rao for Petitioner.

B. V. Ramanarasu for Respondent.

K.S.

Happell, J. Balakrishna Mudaliar, *In re.*
31st January, 1946. C R. P No. 671 of 1945.

Court-fees Act (VII of 1870), section 7 (iv) (a)—Suit for cancellation of a decree—Court-fee payable.

Where a suit for possession of immoveable properties was compromised and a decree passed by which the plaintiff who had purchased the properties in a Court auction sale agreed to reconvey all the properties to the defendants on his being paid a sum of Rs 3,000, for a subsequent suit to have the compromise decree cancelled on the ground that it had been obtained by fraud, court-fee is payable under the provisions of section 7 (*iv*) (*a*) of the Court-Fees Act on the value of the decree in the former suit A Court-fee of Rs 15 under Article 17-A of Schedule II of the Court-Fees Act will not be sufficient

55 M.L J. 345, distinguished.

N. C. Raghavachari for Petitioner.

(The Government Pleader) *K. Kuttikrishna Menon* for Respondent.

K.S.

Wadsworth and Rajamannar, JJ. Albuquerque *v* Catholic Bank, Ltd.
1st February, 1946. A. A O. No. 436 of 1945.

Arbitration Act (X of 1899), section 15—Award filed in Court—' Execution as if it were a decree '—Limitation—Starting point—Limitation Act (IX of 1908), Article 182 (5).

An award acquires the incidents of a decree when it is filed in Court under section 15 of the Arbitration Act, 1899, and in applying article 182 of the Limitation Act the date of the decree or order cannot be any earlier than the date on which by being filed into Court that which was a non-judicial decision becomes clothed with a judicial character as if it were a decree. The anomaly that it might be possible to file in Court an award which was twenty years old without leaving open any objection to the parties on the ground of limitation is a matter for the Legislature and not the Courts.

The Advocate-General and *Messrs Pais, Lobo* and *Alvares*, for Appellant.

B Sitarama Rao and *R. Somanatha Rao*, for Respondent.

K.S.

Kuppuswami Aiyar, J Narayana Ayyar, *In re.*
5th February, 1946. Cr. R. C. No. 132 of 1946.
(Cr. R. P No. 126 of 1946).

Criminal Trial—Summons case—Accused secured by bailable warrant—Personal attendance—If can be dispensed with

In respect of certain offences punishable under sections 323 and 324 of the Penal Code though the procedure to be followed is as in a summons case, the magistrate happened to issue a bailable warrant and when the accused sought to have his personal attendance in Court dispensed with, the Magistrate refused the application on the ground that the prosecution of the accused was secured after the issue of a bailable warrant. On revision,

Held, the Magistrate was not justified in taking his stand on an incorrect order of his for refusing the application Even in a summons case it will be open to the Magistrate to insist upon the personal appearance of the accused but he will have to give reasons for the same

P Narayana Kurup and *S Rajaraman* for Petitioner

K S.

Kuppuswami Ayyar, J.
8th February, 1946.

Sala Mahamad, *In re.*
Cr. R. C. No. 375 of 1945.
(Cr. R. P. No. 350 of 1945).

Madras Rationing Order, clause 4—" Rationed article "—Interpretation—Wholesale dealer effecting sale of paddy within a rationed area to persons living outside the area—Offence —Bona fides of seller—Effect on sentence.

A wholesale dealer who had a licence to sell paddy and rice at Tellicherry (a rationed area) sold some paddy to two persons in Kallai, outside the limits of Tellicherry He did not have a permit entitling him to sell in the area any rationed article He was prosecuted for contravention of clause 4 of the Madras Rationing Order and on conviction was sentenced to pay a fine of Rs 10,000. On revision, it was contended that an article will be a " rationed article " only if it is to be sold for use in a rationed area and if it is to be used or dealt with in a place other than the rationed area, it will not be a " rationed article." Negativing such contention

Held, the participle " rationed " must be understood as referring to the article and not to the use to which it is put or the place where it is to be used. The scheme of the Rationing Order clearly indicates that it deals only with transactions in respect of rationed articles which are sold and purchased in the area. Accordingly the seller not being an " authorised wholesale distributor " as defined in the order, is guilty of selling a rationed article to a person in contravention of the order.

As the sale however, was made *bona fide* it was not necessary to give an exemplary punishment and the fine must be reduced to Rs. 500.

V. Rajagopalachari for Petitioner

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Aiyar, J.
8th February, 1946.

Kuttiali, *In re.*
Cr. R. C. No 455 of 1945.
(Cr. R P. No 418 of 1945).

Madras Rationing Order, clause 6—Resident of non-rationed area purchasing paddy in rationed area for use outside area—Offence

Where persons living outside a rationed area purchase 'rationed articles' within the rationed area they are guilty of an offence. The question whether the article is a " rationed article " or not, is to be determined with reference to the nature of the article and not with reference to the area in which it is to be used or consumed.

B. Pocker for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
18th February, 1946.

Pichai Pillai, *In re*
(Cr. R C. No. 1072 of 1945.
(Cr. R. P. No. 991 of 1945).

Criminal Trial—Lacuna *in prosecution evidence—Effect—Serious offence affecting public interest—If ground for directing a retrial.*

If there is a *lacuna* in the prosecution evidence, the accused is entitled to have the benefit of the same. The burden is on the prosecution to prove that the accused is guilty and, if the evidence is not sufficient to bring the guilt home t the accused, the judge has no other course but to acquit him. Even if the offence is a serious one affecting the public interest, there is no justification for directing a retrial.

K. Kalyanasundaram for *V. T. Rangaswami Aiyangar* and *R. Santanam* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Wadsworth and Rajamannar, JJ. Ramayya Moopanar *v.* Suppammal
28th January, 1946. Appeal No 465 of 1944.

Arbitration—Reference—Natural and legal guardian of minors—Competence to refer to arbitration

It cannot be contended that the natural and legal guardian is incompetent to make a reference to arbitration on a matter with regard to which a reference is for the benefit of the minors

14 C L.J 188, relied on

P N Marthandam Pillai and *C Rangaswami Ayyangar* for Appellant

K Venkateswaran and *A V Avudainayagam* for Respondents

K S.

Wadsworth and Rajamannar, JJ Periyakaruppan Chettiar *v.* Venugopal Pillai
29th January, 1946 A A O No 601 of 1944.

Mortgage—Final decree passed during pendency of appeal against preliminary decree—Modification of preliminary decree on appeal—Effect—Executability of final decree—Modification of final decree—Procedure and limitation

A preliminary decree on a mortgage was passed on 4th May, 1929, for Rs. 6,905-13-0 giving three months time to pay, that is till 4th August, 1929. The eighth defendant a puisne mortgagee impleaded in the suit preferred an appeal to the High Court with regard to the claim for interest and that appeal was allowed on 26th November, 1934, reducing the amount payable to Rs 6,112-8-2 Pending appeal, as further proceedings had not been stayed, the trial Court passed a final decree on 23rd September, 1933, on the basis of the preliminary decree of 4th May, 1929 After the decision of the High Court on appeal the decree-holder filed an execution petition on 23rd September, 1936, and again another petition in 1939, and finally on 31st March, 1942. he filed an execution petition for further proceedings in execution by bringing the mortgaged properties to sale. Along with that he filed a miscellaneous application for an amendment of the execution petition by substituting in columns 8 and 11 the amount payable according to the preliminary decree as modified by the High Court in place of the amount fixed by the preliminary decree of the trial Court. Both the applications were allowed and on an appeal against the order on the miscellaneous application it was contended that no appeal lay against the order

Held, (*i*) As the order in question did decide that the decree-holder was entitled to proceed with the execution of his decree the appeal will certainly lie

(*ii*) The fact that an appeal was preferred against the preliminary decree did not prevent the trial Court from passing the final decree and such a decree will be executable notwithstanding that certain modifications may be necessary in view of the appellate judgment The final decree can be executed with such modifications as may be necessary in the circumstances which might as well be made in the execution petition filed after the appellate decree. (1939) 2 M.L J. 86, applied ; I L R. 1943 Mad 804 : (1943) 1 M L J 198, distinguished

(*iii*) The fact that the appropriate modifications have to be made in the final decree already passed as a result of the decision of the appellate Court cannot arm the judgment-debtor with an objection that any formal application for such modification is barred by time if made after three years from the date of the decree of the appellate Court There is nothing in the Code which makes it incumbent on a decree-holder to make an application which would be governed by Article 181 of the Limitation Act to obtain any fresh relief.

T. E Ramabhadrachariar for Appellant.

T. K. Srinivasathathachariar for Respondent.

K.S.

NRC

Chandrasekhara Aiyar, J. Palaniammal *v.* Arumugam Chetti.
1st February, 1946. A A O No. 325 of 1945

Res judicata—*Execution of decree for maintenance against husband—Plea that decree had become unexecutable by resumption of cohabitation after the decree—Failure to set up plea in prior application for execution—Bar of constructive* res judicata

Where in a prior application for execution of a decree for maintenance against the husband, the husband after notice did not come forward with any objections but resisted a subsequent application for execution by an objection that as cohabitation was resumed after the decree, the decree had become ineffective and was unexecutable,

Held, that the plea was barred by constructive *res judicata.* It is an objection which might and ought to have been raised in the prior application for execution.

C S Swaminathan for Appellant

C. Vasudevan for Respondent

K S.

Chandrasekhara Aiyar, J Subbiah Pillai *v* Muthal Achi.
7th February, 1946 S A No 629 of 1945.

Stamp Act (II of 1899), *section* 35—*Scope and effect—Usufructuary mortgage evidenced by unstamped documents—Invalidity—Mortgagee admitting possession and claiming prescriptive right under the invalid mortgage—Suit by mortgagor to redeem property—If barred.*

In a suit for redemption of a usufructuary mortgage created under an unstamped *muri* though the plaintiff cannot rely on any secondary evidence of the unstamped *muri,* where the mortgagee had in a prior suit admitted that he had acquired title as usufructuary mortgagee by enjoyment for over the prescriptive period, the mortgagee cannot deny the mortgagor's right to redeem the property. Where the *muris* were relied on not as evidence of a mortgage sought to be redeemed but only to show how the prescriptive right was created in the defendant, the suit is maintainable

I L R. 30 Mad 386, distinguished

T Krishna Rao and *R Subramanyan* for Appellant

V. Ramaswami Aiyar for Respondent.

K S.

Wadsworth and Yahya Ali, JJ Govinda Rao, *In re.*
11th February, 1946. C M P. No 569 of 1946.

Letters Patent (Madras), clauses 15 *and* 44—*Clause* 44 *if abrogates clause* 15—*Appeal against judgment of single judge in second appeal—Necessity for certificate of fitness for appeal.*

By clause 15 of the Letters Patent (Madras) it is necessary that the Judge who has passed the judgment in a second appeal shall certify it as a fit case for appeal in order that an appeal under that clause may lie. It cannot be suggested that clause 44 in any way abrogates the effect of clause 15.

Petitioner in person.

K.S

Kuppuswami Ayyar, J. Sevuttu Raman, *In re.*
21st February, 1946. Cr.R C. No. 6 of 1946.
(Case Refd No. 1 of 1946).

Criminal trial—Deaf accused—Trial—Difficulty of making the accused know what is taking place in Court—Proper procedure.

Where though an accused is deaf he could be made to hear when talked to at a close range, it cannot be said that it is a case in which it is not possible for the trying magistrate to make the accused know what is going on. Merely because of the difficulty of having somebody to speak to the accused at close range and explain to him what all has taken place in Court as and when the proceedings go on, such a procedure cannot be dispensed with.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

K.S.

Wadsworth and Rajamannar, JJ. Ramasubba Aiyar *v.* Muthu KR. AR.
18th January, 1946. PL. Arunachalam Chettiar.
Appeal No. 574 of 1944.

Limitation Act (IX of 1908), Article 132—Charge declared by decree in favour of subrogee —Suit to enforce charge—Starting point of limitation.

S, a creditor of *M*, the original owner of certain properties filed a suit to recover an amount due to him and obtained an attachment before judgment of the properties of the debtor including the suit properties, which were actually attached in March, 1917. Eventually he obtained a decree in the suit and his legal representatives brought the attached properties to sale and purchased them themselves on 8th April, 1929. *X* purchased the suit properties in 1920 from *N* to whom *M* had alienated the same in 1918 When the auction-purchasers proceeded to obtain delivery of the properties, they were obstructed by *X* who was in possession under his purchase from *N*.

Meanwhile a mortgagee of *M* obtained a decree for sale and assigned the decree to *Y*. There was another mortgage also on the properties *X* claiming to have discharged these encumbrances urged in the execution proceedings for delivery that in any event he was entitled to remain in possession till he was reimbursed in the amount paid by him to discharge the encumbrances subsisting on the property. Ultimately on 28th August, 1931 the High Court ordered that possession should be delivered to the auction-purchasers but made a declaration that *X* had a charge for the amounts paid by him to discharge the various mortgages In 1937 the auction-purchasers sold the property to *A* on 13th August, 1943, and *X* instituted a suit to enforce the charge declared in his favour. On a question as to limitation,

Held, that right of *X* to subrogation became merged in the order of the High Court declaring the charge and the suit to enforce it was in time In the circumstances it is unnecessary to deal with the difficult question whether the starting point of limitation for a suit to enforce the right of subrogation by a puisne encumbrancer is the date of payment by him in discharge of the prior encumbrance or the date when the prior encumbrance itself became payable.

I L R (1944) All. 654 : (1944) 2 M L J 330 (P C.), relied on.

(1945) 1 M L J. 341, distinguished

P S Sundaram for Appellant.

S. Panchapagesa Sastri and *P. S. Sarangapani Aiyangar* for Respondent.

K S

Chandrasekhara Aiyar, J. Mutyalu *v.* Veerayya
5th February, 1946. S A No 60 of 1945.

Evidence Act (I of 1872), section 92—Scope—Doctrine of part performance under section 53-A, Transfer of Property Act—Proof aliunde *of consideration—If prohibited.*

The prohibition in section 92 of the Evidence Act is only as regards evidence sought to be adduced for the purpose of contradicting, varying, adding to or subtracting from the terms of a contract So long as the passing of consideration is not a term of the contract, evidence adduced to show that it did pass, even though the contract does not recite it, is not within the scope of the prohibition in section 92 Where a letter evidences the terms of a contract under which possession of land is supported on the basis of part performance, if the contract does not recite the consideration for the transfer, there is no prohibition to proof *aliunde* of the consideration

K S Desikan and *J Sitamahalakshmi* for Appellant

B Sitarama Rao and *B Somanatha Rao* for Respondents

K S

Happell, J. Lingala Bugga Reddi *v* Yerikala Reddi
8th February, 1946 A A A O No 152 of 1945.

Hindu Law—Decree against father on promissory note in favour of endorsee of the note—Subsequent partition—Property in the hands of the sons—If can be proceeded against in execution when sons were not made parties to the suit at all

It has no doubt been held that where the sons of a Hindu had been impleaded in a suit on a promissory note by the father, though exonerated, the decree-holder

could proceed against the interest of the sons after partition. But there is no authority for the view that this procedure can be adopted where the sons were not parties at all to a suit brought by an endorsee of a promissory note executed by the father, unless such note was executed by the father in his capacity as manager of the family. I L.R. (1937) Mad. 880 : (1937) 2 M.L J. 251 (F.B.), dist.

P. Satyanarayana Rao for Appellant.

Respondents not represented.

K.S.

Chandrasekhara Aiyar, J. Katheessa *v.* Raman Nambiyar.
14th February, 1946 S A No. 687 of 1945.

Malabar—Kudima *tenancy—Tenants to bring lands to cultivation, effect improvements and enjoy them themselves and pay rent from sixth year onwards—Subsequent assessments on the land—Person liable for—Revenue Recovery Act (I of 1890), section* 35*—Scope.*

Section 35 of the Revenue Recovery Act must be read as subject to any enforceable rights and obligations as between the landholder and tenant with reference to the assessment, such obligations flowing out of any agreement between them. The agreement need not be expressed but can be implied from the surrounding circumstances, probabilities and conduct. I.L.R. 34 Mad. 231 : 20 M.L J. 640 (F.B), considered.

Where in respect of a *kudima* tenancy in Malabar created by a marupat of the year 1871 when the lands were waste lands and it was contemplated that the tenant should bring the lands under cultivation, effect improvements and enjoy them and it was provided that the tenant should pay from the sixth year onwards a rent of Rs. 25 per year for all time, it could not be said that the parties entered into this arrangement with the possibility present to their minds of assessment being imposed in the future Any future liability for assessment need not be borne by the landlord In the case of such tenancies the obligation to pay revenue is with the tenant and a purchaser of the tenant's rights will be liable to pay the assessment and not the landholder. (Leave granted).

C. K. Viswanatha Aiyar for Appellant.

S. Venkatachala Sastri for Respondent.

K.S.

Happell, J Satyanarayanamurthi *v.* Appanna.
18th February, 1946. C. R P. Nos. 367 & 368 of 1945.

Madras Estates Land Act (I of 1908), *section* 131*—Application for sale to be set aside —Notice to purchaser—Necessity.*

It is necessary to give notice to the purchaser of an application for the sale to be set aside before an order on such application could be passed. The failure to give such notice will invalidate the proceedings. 12 L W. 354, followed.

Kasturi Seshagiri Rao for Petitioner.

Respondents not represented.

K S.

Kuppuswami Ayyar, J. Maruthy *v.* Thavyil Pathumma.
19th February, 1946 A A. A O No 145 of 1945.

Malabar Tenancy Act (XIV of 1930), *section* 33*—Petition under—If maintainable by an insane person.*

It cannot be said to have been the intention of the framers of the Malabar Tenancy Act that no petition under sec. 33 of the Act could be filed by a minor, insane person, or person under a disability on the ground that they are not competent to contract. The section is only a protection to the tenant, to the helpless man who is not able to find any residence. Persons under disability are likely to be at a greater disadvantage than other men and they should not be denied the benefit of the Act. Such a petition can be filed by a guardian of persons under disability. There is no question of contract. It is the order of the Court confirming the right in respect of a portion of a holding as separable kudiyiruppu that confers the right under section 33

K Kuttikrishna Menon for Appellant.

S. R. Subramania Aiyar for Respondent.

K.S.

Happell, J. Appayya *v.* Akkayya.
14th February, 1946. A.A.A.O. No. 109 of 1945.

Provincial Insolvency Act (*V of* 1920), *section* 78 (2)—*Construction—Exclusion of time between date of adjudication and date of its annulment in computing limitation for suits or execution applications by creditor—Limits—Time during which vesting order under section* 37 *was in force—If can be deducted.*

By virtue of section 78 (2) of the Provincial Insolvency Act, the period between the date of the order of adjudication and the date of the order of annulment may be excluded in computing limitation for execution against the debtor. But such period cannot be extended so as to include the period during which the estate was vested in an appointee under section 37 of the Act. It cannot be said that the time till the date of the "final closing of the administration of the estate by the appointee" should also be excluded.

Section 15 of the Limitation Act will not apply to such a case as the vesting order under section 37 did not have the effect of an absolute stay.

42 Mad. 319, relied on.

[Leave to appeal granted.]

K. Umamaheswaram for Appellant.

V. Rangachari for Respondent.

K.S

Happell, J Panakala Rao *v.* Subba Rao.
14th February, 1946. C.R.P. No. 513 of 1945.

Court-Fees Act (*VII of* 1870), *section* 7 (v) *and Schedule II, Article* 17-*B—Joint Hindu family—Suit for partition—Court-fee—Decree against manager said to be enforceable only against manager*—Ad valorem *court-fee as for cancellation of decree—If to be paid.*

Madras Civil Rules of Practice and Circular Orders, Volume I, page 218, *item* 6—*Scope.*

A decree against the manager of a joint Hindu family as such *prima facie* affects the shares of all the members and a member cannot claim the whole of his share in a partition until he has got rid of the decree Where such share is *prima facie* affected by such a decree against the family the plaintiff suing for partition must pay court-fee in respect of any decree against the manager which is contended to be enforceable against such manager alone. Rule 2 of the rules framed under section 9 of the Suits Valuation Act published in Civil Rules of Practice and Circular Orders, Volume I, page 218 as item 6 does not affect the decision in *Ramaswami* v. *Rangachariar*, (1939) 2 M.L.J 818 : I.L.R. (1940) Mad. 259 (F.B.).

Bhavadasan Bhattathiripad v. *Neelakandhan*, (1943) 2 M.L.J. 396 : I.L.R. (1944) Mad. 430, approved.

Even if alienated properties are still in the possession of the manager of the family they must be deemed to be held on behalf of the alienees and not on behalf of the coparceners suing for partition. Court-fee must be paid in respect of the alienations also.

B. V. Ramanarasu for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Yahya Ali, J. Lakshmayya *v.* Krishnarao and others.
14th February, 1946. S. A. No. 2482 of 1944.

Limitation Act (*IX of* 1908), *section* 19—*Acknowledgment—Essentials and test of.*

The principles governing acknowledgments under section 19 of the Limitation Act may be summarised thus . (1) The question whether a particular prior admission amounts to an acknowledgment of subsisting liability so as to save the bar of time should be treated in each case largely upon its own merits. (2) The acknowledgment must be gathered from the document itself but it need not be express nor need it

specify the legal consequences flowing from the admission . It can be inferred by necessary implication from the language used, the context of the admission and the circumstances attending upon the making of the acknowledgment although for that purpose proof *aliunde* cannot be adduced. (3) The inference that can be drawn in the absence of an express admission should be not as a matter of legal inference but as a deduction from the facts and circumstances of the case. (4) If on an interpretation of the document or by necessary inference from the intrinsic features of the document, an acknowledgment is found to have been made before the expiry of the prescribed period of limitation of liability of a subsisting nature in respect of such property or right which is the subject-matter of the action, it would be efficacious to avoid the bar of limitation. (5) If the acknowledgment falls short of admitting liability in respect of the property or right in question or falls short of admitting it as a subsisting liability, the acknowledgment is not effective and the bar of limitation would operate.

[Case-law discussed.]

Ch Raghava Rao and *T Satyanarayana* for Appellant.

P. Satyanarayana Rao for Respondents

K S.

Happell, J. Parukutty Ammal *v.* Rayan.
18*th February,* 1946 A. A A. O No 122 of 1945.

Malabar Tenancy Act (XIV of 1930), *section* 33—*One out of a number of joint tenants —If entitled to apply under section* 33 *for purchasing the kudiyiruppu rights when sought to be evicted.*

Any one of a number of joint tenants could maintain an application under section 33 of the Malabar Tenancy Act to be allowed to purchase the landlord's rights in the kudiyiruppu.

(1945) 2 M.L J 78, applied.

The fact that the tenants are members of a Mahomedan family and so co-sharers entitled each to a specific share makes no difference

K P Ramakrishna Aiyar for Appellant.

D. A. Krishna Variar for Respondent.

K S.

Chandrasekhara Aiyar, J Ammanna *v.* Ramanna.
20*th February,* 1946. S. A. No. 567 of 1945.

Co-sharers—Land with a common well to irrigate it jointly owned—One of the owners losing his right in such lands and getting other lands on partition—Right to take water from the well.

Where joint lands are purchased by brothers with a common well in the middle to irrigate them, if for any reason one of the purchasers loses his right in the joint lands to the ownership of which lands the right to use the well water is incident or appurtenant, he cannot insist on his right to take the water to some other property, the two rights being so intimately connected and interdependent. Where by reason of a partition one of the parties is allotted some other lands but in a suit claiming that that party had his share in the well it was conceded that the well was kept joint the only relief which having regard to the peculiar facts can be given is to declare the plaintiff's right to the share admitted in the well and to restrain the defendants from interfering with his right to take the water from the well, limited to his share provided that the plaintiff does not infringe the defendants' exclusive right to the ownership of the land surrounding the well. How the plaintiff can exercise this right must be left to his genius.

P. Somasundaram for Appellant.

P. R. Ramachandra Rao for Respondents.

K.S.

Happell, J. Gopalaswami Chettiar *v.* Doraiswami Pillai.
21st February, 1946. A.A.A O. No. 3 of 1945.

Civil Procedure Code (*V of* 1908), *section* 65—*Sale of immoveable property in execution—Date of vesting of title of purchaser.*

X filed a suit to enforce a mortgage on 30th January, 1941. He obtained a decree and purchased the property himself in sale held by the Court on 7th December, 1942 When however, he sought to take possession, he was resisted by *A* who claimed to be a purchaser of the same property from *S* who had herself purchased the property in a Court sale held in execution of a money decree obtained by her against the mortgagor of *X* on 18th July, 1940 The sale was confirmed on 5th April, 1941

Held . As by virtue of section 65 of the Code of Civil Procedure on confirmation of the sale the property is deemed to have vested in *S* from the date of sale (18th July, 1940) she is in the same position as if she had purchased the property outright on 18th July, 1940. Accordingly *S* and her alienee were entitled to notice of the proceedings in the mortgage suit.

I L R. 2 Cal 141 and I.L.R 11 Cal 341, relied on.

S not having been impleaded in *X's* suit, *S* and *A* were not bound by the mortgage decree or sale in pursuance of it.

S. Panchapakesa Sastri and *P S Ramachandran* for Appellant.

M S Venkatarama Aiyar for Respondent.

K.S.

Happell, J Satyam Ramudu *v* Rayalamma.
21st February, 1946. C R P No 975 of 1945.

Contract Act (*IX of* 1872), *section* 45—*Scope —Joint promisee disclaiming any interest in the debts sued on—Need not be impleaded in the suit*

Section 45 of the Contract Act is intended to protect a promisor from a multiplicity of suits If, however, the suit is brought for the whole amount of the debt by all the joint promisees except such of them as disclaim all interest, the promisor would be as well protected as if all the joint promisees were impleaded in the suit. The rule enunciated in section 45 that a suit to enforce a promise made to two or more persons jointly cannot be maintained unless all the promisees are parties to the suit, is subject to an exception that a joint promisee who has ceased to have any interest in the debt is not a necessary party to the suit. The question whether such promisee has ceased to have any interest is one of fact.

9 I C 111, approved.

Accordingly where the heirs of a deceased joint promisee had ceased to have any interest in the debts, they need not be impleaded in a suit to enforce the debt by the other promisees

A V Avudainayagam for Petitioner

Ch. Raghava Rao for Respondent.

K S.

Happell, J. Ponnuswami Servai *v.* Venugopala Thevar.
22nd February, 1946 A. A A O No. 69 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 16—*Assignee of* ex parte *decree—If entitled to execute revised decree passed after setting aside the* ex parte *decree*

An assignment of an *ex parte* decree is no doubt an assignment of the assignor's interest in the *ex parte* decree, but that interest ceases when the *ex parte* decree is set aside and it cannot be regarded as revived in the fresh decree passed in the suit so as to enable the assignee to execute the new decree.

Such an assignment may however be made to include terms which would entitle the assignee to execute any decree that may ultimately be passed in the suit.

[Leave to appeal granted.]

A. V. Viswanatha Sastri for Appellant.

M. S. Venkatarama Aiyar and *M. S. Mahadeva Aiyar* for Respondents.

K S.

Chandrasekhara Aiyar, J.
22nd February, 1946.

Corporation of Madras *v.* Janab Mir Gulam Ali.
C.C.C App. No. 50 of 1945.

Madras City Municipal Act (IV of 1919), *section* 106, *clause* (4)—*Property tax—Liability—Suit against original owner after his transferring the property and decree thereon for the taxes—Subsequent suit for the same taxes against transferee—Bar of.*

Where the corporation sought to proceed against the original owner of certain property for arrears of property tax and obtained a decree thereon even though the owner had transferred the property before the filing of the suit, the claim having become merged in the decree the corporation cannot be allowed to sue again the transferee for the same arrears on the ground that they had not recovered the amount from the transferor or that the decree had been allowed to become barred as against the transferor

K. Subba Rao for Appellant.

V. Srinivasan and *R. Narasimhachariar* for Respondent.

K.S

Wadsworth, J
28th February, 1946.

Potharaju *v.* Venkatakrishnarao
A A A O. No. 168 of 1945.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 20 *and* 19—*Decision as to agriculturist status in revision against order on application under section* 20—*If* res judicata *in subsequent proceedings under section* 19.

A decision as to the status of an alleged agriculturist seeking a stay under section 20 of Madras Act IV of 1938 is only a summary adjudication on *prima facie* evidence, not necessarily after notice to the creditor and it will not bar a subsequent contest regarding the debtor's status and right to relief in the subsequent proceedings under section 19, even if it is an order in revision of an order under section 20, it will not operate as *res judicata* except as to the right to a stay.

(1939) 2 M L J 495, relied on

V. Rangachari for Appellant.

P. Sivaramakrishniah for Respondent

K S.

Kuppuswami Ayyar, J
4th March, 1946

Chockalingam Pillai and others, *In re.*
Cr. R. C. No. 1054 of 1945.
(Cr. R. P No. 988 of 1945).

Madras Criminal Rules of Practice, rule 366—*Expenses of defence witnesses—When payable by the accused himself—Offence under rule* 81 (4), *Defence of India Rules, punishable with three years' imprisonment or with fine—Whether bailable offence—Test for deciding—Criminal Procedure Code, Schedule II—Bailable and non-bailable offence—Test.*

Rule 366 of the Madras Criminal Rules of Practice specifically provides for the payment of expenses of witnesses by Government in cases shown in the Second Schedule of the Code of Criminal Procedure as not bailable. In a case in which an accused is prosecuted for an offence punishable under rule 81 (4) of the Defence of India Rules for ascertaining whether the case is bailable or non-bailable the maximum punishment awardable under the rule for its contravention must be taken into consideration and if there is a possibility of the accused being awarded three years' imprisonment then the case will come under class, "if punishable with imprisonment for three years and upwards but less than seven years" and the offence will not be a bailable one according to Schedule II of the Criminal Procedure Code. If the offence is not bailable the expenses of the witnesses for the accused will be payable by the Government. A.I R. 1944 Nag 149, referred to.

A. C Krishnaswami for Petitioners

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Wadsworth, J.
25th February, 1946

Periasami Mooppanar *v* Venkatapathi Raju.
S. A. No 2336 of 1944

Transfer of Property Act (*IV of* 1882), *section* 59—*Suit to enforce mortgage—Defendants, if can show that mortgage was not for cash advance but to secure a fluctuating balance of account*

In a suit to enforce a mortgage while it is open to the defendants to show that there was failure of consideration or that the consideration was advanced in a different way than that recited in the bond, it is not open to them to say that the mortgage was not one for sums advanced, but was a security bond for a fluctuating debt made up not merely of sums advanced under the deed but partly of future sums to be advanced after the balance between the parties had been reduced below the amounts stipulated in the deed That will be a totally different contract affecting immoveable property and creating what is in effect a mortgage for a fluctuating amount, which under section 59 of the Transfer of Property Act will have to be in writing and registered.

S. K. Ahmed Meeran for Appellant.

N. Rajagopala Aiyangar and *M. Seshachalapathi* for Respondents

K.S

Chandrasekhara Aiyar, J.
25th February, 1946.

Singara Mudali *v.* Ibrahim Baig Sahib.
S. A. No. 797 of 1945.

Minor—Purchaser from of property subject to a covenant to reconvey—If specific performance of that covenant can be enforced against such purchaser.

X purchased from three minors and their mother some property subject to an agreement to reconvey it to *Y* and his two brothers. In a suit by *Y* to enforce specific performance of the agreement to reconvey,

Held, as *X* stands in the shoes of the minors the defences open to them would be available to him generally speaking As there could be no decree for specific performance against the minors, *X* who claims under a purchase from them, is not liable either. *Y* could have specific performance only as far as the share of the mother of the minors was concerned The question whether specific performance should be decreed or not depends not so much on the void or voidable nature of the contract but of its being executory or executed so far as the minors are concerned.

V. T. Rangaswami Aiyangar and *R Santanam* for Appellant

C. A Muhammad Ibrahim and *T S Santhanam* for Respondent.

K.S.

Happell, J.
27th February, 1946

Kalidasa Chetty *v.* Dodda Siddha Chetty.
C R P. No. 953 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 89—*Deposit to have a sale set aside short by Rs* 1-4-0 *due to mistake of party—Making up deficiency after thirty days had expired —Court has no jurisdiction to excuse the delay—Amendment of Order* 21, *rule* 92—*Effect.*

The responsibility for paying the correct amount under Order 21, rule 89 of the Code of Civil Procedure lies with the payer who wishes to have the sale in execution set aside and not with the clerk who receives the lodgment schedule. Where the deposit is short by Rs. 1-4-0 owing to a mistake of the party and is made good after the expiry of thirty days the Court has no jurisdiction to excuse the delay.

N R C

It cannot be said that the shortage could have been adjusted by appropriating it from the amount of poundage to which the thirty days limitation does not apply.

21 M L J 631 followed ; A I.R 1934 Pat 246, not followed.

The amendment of rule 92 of Order 21 does not affect the position as the mistake which led to the depositor paying Rs 1-4-0 too little was clearly within his control.

K Krishnaswami Aiyangar and *N. C. Raghavachari* for Petitioner

A C Sampath Aiyangar and *S Krishnamachari* for Respondent

K. S

Yahya Ali, J Kasivisvanadham *v* Nagayya.
27th February, 1946. C R P No. 1076 of 1945.

Civil Procedure Code (V of 1908), Order 37, rule 3—Leave to defend—Triable issue—Right to unconditional leave—Order under rule 3 of Order 37, if open to revision under section 115.

Where in a summary suit on a negotiable instrument there is a triable issue based on a plausible defence leave to defend should be granted unconditionally. The discretion vested in the Court under Order 37, rule 3 of the Civil Procedure Code should not be exercised in such a case to impose terms as to deposit or security before grant of leave to defend. The High Court in revision has jurisdiction under section 115 of the Civil Procedure Code to interfere with an order made under Order 37, rule 3

P Somasundaram and *P Suryanarayana* for Petitioner.

P Sivaramakrishniah for Respondent

K.S

Wadsworth, J. Rajah of Venkatagiri *v.* Ramaswami.
27th February, 1946 A A A O. No. 28 of 1945 & C R. P. No. 158 of 1945.

Madras Estates Land Act (I of 1908), sections 131 and 132—Setting aside of sale in execution of rent decree—Section 47 and Order 21, rule 90 of the Civil Procedure Code not applicable.

The Madras Estates Land Act contains a simplified law of procedure for execution of rent decrees which excludes the application of the execution provisions of the Code of Civil Procedure. An order by a sub-Collector setting aside a sale held in execution of a decree for rent under the Madras Estates Land Act cannot therefore be treated as an order either under Order 21, rule 90 or under section 47 of the Code of Civil Procedure and no appeal lies against such order.

(Case-law discussed).

K. Subba Rao for Appellant

M. V Nagaramayya for Respondent.

K.S

Rajamannar, J. Basi Reddi *v* Veerayya.
28th February, 1946. S A No. 372 of 1945.

Declaration—Suit for, at instance of party in possession though without title—Maintainability

A suit for declaration on the basis of possession is maintainable. But if the plaintiff seeks to rely on it, it should be clearly set up, so that the contesting defendants may know what they have to meet. 25 I C 935, relied on.

Where the suit is not framed on the basis of possession it is not open to the Court when the plaintiff fails to establish title to the property to grant a declaration that the plaintiff is entitled to possession though he is not the owner, until such time as he is ousted in due course of law by the person entitled to possession by virtue of title to the property.

Ch Raghava Rao for Appellant.

Respondent not represented.

K S

Chandrasekhara Aiyar, J. Gopalakrishnamurthi Reddi *v.* Subramania Mudaliar.
4th March, 1946. S A No. 2286 of 1944.

Transfer of Property Act (*IV of* 1882), *section* 59—*One of the attesting witnesses stating that he signed the deed as first attestor but omitting to say that the other witness also attested the execution of the deed—Opportunity to supply such lacuna to be given.*

Where one of the attesting witnesses to a mortgage deed deposed that he signed the deed as first attestor but omitted to say that the other witness also attested the execution of the deed, an opportunity should be afforded to the plaintiff to supply the lacuna especially where there was no specific denial that the document had been attested by two witnesses and the defence only vaguely pleaded that "the defendant does not know anything about the suit hypothecation."

V. S. Rangachari for Appellant.

K. V. Krishnaswami Aiyar and *A. K Muthuswami Aiyar* for Respondents.

K S

Wadsworth, J. Lakshminarayana *v.* Lakshminarasamma.
7th March, 1946 A. A A. O No. 182 of 1945.

Madras Agriculturists' Relief Act (*IV of* 1938), *section* 19—*Finding that debtor is agriculturist—If appealable*

There is no right of appeal against a mere finding that a petitioner is an agriculturist entitled to the benefits of the Act The person aggrieved by such finding must await the final decision as to the amount if any due and in the appeal against that decision he can canvass the correctness of the preliminary finding

N V B Shankara Rao for Appellant.

Respondent not represented.

K S.

Kuppuswami Ayyar, J. Manikyala Rao, *In re.*
7th March, 1946 Cr. R. C No. 1128 of 1945.
(Cr R. P No 1044 of 1945).

Criminal Procedure Code (*V of* 1898), *section* 145—*Parties to proceedings under—If can be compelled to appear in person or execute bonds for appearance—Right to appear by pleader or remain* ex parte

Persons who are parties to proceedings under section 145, Criminal Procedure Code cannot be compelled to appear in Court in person It may be open to the Magistrate to summon them as witnesses if they are wanted either as Court witnesses or witnesses for the other side But then they will be attending Court as witnesses and not as parties Accordingly such persons cannot be compelled to execute bonds for appearance or appear in Court. They can appear by pleader or if they do not appear and let in evidence the case will be disposed of *ex parte*

S Kothandarama Nainar for Petitioner

P Sivaramakrishnayya and *K. Bhimasankaram* for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S

Kuppuswami Ayyar, J.
8th March, 1946.

Narayana Singh *v.* Seetharatnamma.
Cr R. C No. 936 of 1945.
(Cr. R P No 876 of 1945)

Criminal Procedure Code (*V of* 1898), *section* 253 (1)—*Discharge of accused under—Cannot be ordered without examining all the witnesses cited by the complainant*

In respect of a complaint of cheating by failing to return some jewels borrowed from the complainant a number of witnesses were cited and it was stated that three persons were present at the time of the delivery of the jewels The Magistrate took evidence and also examined a court witness but passed an order of discharge under section 253 (1) of the Criminal Procedure Code on the evidence taken by him without examining the investigating officer and one of the persons cited as a witness to prove delivery of the jewels to the accused When the matter was taken in revision, the Additional District Magistrate dismissed it saying that what the Magistrate must have meant was that he was discharging the accused under section 253 (2). On further revision to the High Court,

Held, that there was no justification for thinking that the Magistrate intended to discharge under section 253 (2) when he definitely stated in his order that he discharged the accused under section 253 (1) The Magistrate has no power to discharge under section 253 (1) of the Code until he has examined all the witnesses.

I L.R 4 Mad. 329, relied on.

V. T. Rangaswami Aiyangar for the Petitioner

K. S. Jayarama Aiyar and *K. Ramaseshayya Chowdry* for Respondent.

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
14th March, 1946

Satyanarayana Sastry, *In re.*
Cr R C No. 12 of 1946.
(Cr. R P No 11 of 1946.)

Criminal Procedure Code (*V of* 1898), *section* 145—*Complaint that acts of counter-petitioner will lead to breach of peace—Order of warning without enquiry—Not proper—Procedure.*

The petitioner filed a petition before the Joint Magistrate of Chandragiri complaining that the counter-petitioners and their party had no right to recite *sankalpam* at the tank at Tirumalai Hills at Tirupati and that there was a likelihood of a breach of the peace Instead of taking evidence and going into the matter the Joint Magistrate directed the police to warn the counter-petitioners not to create a breach of the peace by reciting such *sankalpams* The matter was taken in revision to the Sessions Judge who set aside the order of warning On revision,

Held, the trial Court had no jurisdiction to issue such a warning without taking evidence and deciding whether such a right was there or not. Nor has the Sessions Judge any jurisdiction to sit in revision over such an order and pass an order himself. The Sessions Judge if he finds that the order of the Joint Magistrate was wrong, should write to the High Court asking it to interfere

V. T. Rangaswami Aiyangar and *K Kalyanasundaram* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J Panchapakesa Aiyar *v* Rajamani Ayyar.
22nd February, 1946 S A No. 476 of 1945

Civil Procedure Code (V of 1908), *Order* 34, *rule* 14—*Sale in contravention of—If void or voidable—Limitation for setting aside—Sons of Hindu judgment-debtor—How far bound by sale in execution.*

As regards sales held in contravention of Order 34, rule 14, Civil Procedure Code, it is now settled law that such a sale is not void but only voidable and is good until it is set aside The violation of the provision in Order 34, rule 14, Civil Procedure Code, confers on the person affected only a right to have the sale set aside either by way of application or by way of suit, if a suit is permissible. But the application or suit must be filed within the time provided by law namely one year from the sale The sons and grandsons of a Hindu judgment-debtor are bound by a sale held in contravention of Order 34, rule 14 if it is not set aside The fact that the son or grandson was not *eo nomine* a party to the suit is of no consequence as the interests of the son or grandson is capable of being sold in execution of the decree against the father

Quaere · Whether where a separate promissory note is executed for arrears of interest and a sale is held in execution of a decree on the promissory note there is contravention of Order 34, rule 14, Civil Procedure Code

V S Rangaswami Aiyangar for Appellant

S T. Srinivasagopalachariar for Respondent

K.S

Lakshmana Rao, J Achuthan Nair *v.* Devaki
22nd February, 1946. S A No 150 of 1945

Malabar Tenancy Act (XIV of 1930), *section* 20 (6)—*Person evicted from holding on ground that holding was required by landlord* bona fide *for building purposes—Subsequent transfer of land to stranger—Suit by evicted tenant for restoration—Section* 43 (1) (b)—*Limitation under—If applicable*

A tenant was evicted under section 20 (6) of the Malabar Tenancy Act on the ground that the holding was required by the landlord *bona fide* for building purposes for his tarwad The lands were transferred to a stranger on 8th June, 1942 and the tenant filed on 22nd December, 1942, a suit for the restoration of the lands On a contention that the suit was premature,

Held Under the circumstances the tenant shall be entitled to the right of suit under sub-section (1) of section 21 and the suit can be instituted within one year from the date of transfer by the landlord as provided for in section 43 (1) (*a*) Section 43 (1) (*b*) is not applicable and the right to sue cannot be postponed until the expiry of six years after eviction of the tenant Section 43 (1) (*b*) relates to the right of suit conferred by sub-section (2) of section 21, that is the right to sue for restoration of the lands if the building for constructing which the eviction was obtained is not erected on the lands within six years of such eviction

D A Krishna Variar for Appellant

S. R. Subrahmania Aiyar for Respondents

K.S

Happell, J Thukra Shetty *v* Sarasamma Shedthi
25*th February,* 1946 C R P No 484 of 1945.

Penal Code (XLV of 1860), *section* 206—*Complaint of removal of attached properties—Court making complaint if should decide whether case fell within section* 206

In directing that a complaint should be made against the accused of removing attached property (which may amount to an offence under section 206 of the Penal Code) it is sufficient if the District Munsiff who gave the direction is satisfied that there was a *prima facie* case against the accused It is not necessary that before giving the sanction the District Munsiff should have considered whether the case fell under section 206 of the Penal Code by being " fraudulent " rather than " dishonest ".

The distinction between " fraudulent " and " dishonest " is a fine one and if the definition of the two words has any importance in the case the question can

be decided by the Criminal Court. Even if the decision of the Court is unnecessary it would only be a superfluity and will not vitiate the proceedings.

1936 M.W.N. 1150 and (1937) 2 M L J. 802, distinguished.

T E Ramabhadracharia for Appellant

K Y Adiga and *K. P. Adiga* for Respondent.

K.S.

Happell, J. Muthal Achi *v* Somasundaram Chettiar.

27th February, 1946. C.R P No 657 of 1945.

Civil Procedure Code (V of 1908), *Order* 1, *rule* 10 (2)—*Scope—Third party claiming interest adverse to parties already on record—If can be impleaded*

The language of Order 1, rule 10 (2) of the Code of Civil Procedure is not wide enough to include a third party who seeks to be impleaded as defendant or plaintiff merely on the ground that he has an interest adverse to the plaintiff already on record. (Case-law discussed)

Accordingly a third party cannot be impleaded in a suit on his own motion simply on the ground that he and not the plaintiff is entitled to the decree claimed, when his application is supported neither by the plaintiff nor by the defendant already on record.

V Ramaswami Aiyar for Petitioner.

N. G Krishna Aiyangar for Respondent.

K S.

Yahya Ali, J. Muthappudayan *v* Chinna Ekammai Achi.

28th February, 1946. C.R P No. 1198 of 1945.

Civil Procedure Code (V of 1908), *sections* 63 *and* 73—*Combined operation and scope of —Claim to rateable distribution—Application to Court actually executing decree—If essential.*

In order to entitle a creditor to rateable distribution all that is necessary is that he shall have made an application for execution of his decree before the Court executing the decree has received the assets of the judgment-debtor. If he has made an application to a Court of competent jurisdiction, although not to the Court executing the decree, he is entitled to rateable distribution without any other application, although as a matter of prudence he should notify the Court actually executing the decree of his claim I L R. 1940 Mad. 526 : (1940) 1 M.L J 482 (F B) and A I R 1937 Nag 80, relied on.

N R Govindachari for Petitioner

R. Kesava Aiyangar for Respondent

K S.

Happell, J. Thiruvengadam Pillai *v* Dharmasiva Pillai

1st March, 1946 C.R.P No. 1234 of 1945.

Civil Procedure Code (V of 1908), *Order* 9, *rule* 13—Ex parte *decree—Application for setting aside—Missing a train—If sufficient ground*

It cannot be said in all cases that missing a train is an insufficient cause for setting aside an *ex parte* decree

A I R 1936 Rang 204, referred to

If it is found that the applicant tried to catch the train and missed it the *ex parte* decree must be set aside.

M S Venkatarama Aiyar for Petitioner

C R. Rajagopalachari for Respondent.

K S.

Wadsworth, J Venkata Seetharamayya *v* Veeraraghavulu.

4th March, 1946. A.A O No 109 of 1945.

Civil Procedure Code (V of 1908), *section* 47—*Order recording compromise of a proceeding under section* 19 *of Madras Act IV of* 1938—*Not one in execution.*

The proceeding under section 19 of the Madras Agriculturists' Relief Act is a proceeding for the amendment of the decree and it is only if that amendment wipes out the decretal amount that a declaration is made that the decree has been satisfied. This is not a process in execution at all. An order recording a compromise of a proceeding under section 19, Madras Act IV of 1938, is not one in execution and would not fall under section 47, Civil Procedure Code. It cannot be

said that the recording of the compromise amounted to a recording a satisfaction of the decree under Order 21, rule 2, Civil Procedure Code.

P Somasundaram and *P. Suryanarayana* for Appellant

V. Suryanarayana for Respondent

K S.

Happell, J. Sri Venkataramana Devara Bhandram *v* Ramanna Rai.
4th March, 1946. C R.P No. 1196 of 1945

Civil Procedure Code (V of 1908), Order 21, rule 89—Deposit made under —If unconditional—If can be recovered as paid under coercion—Contract Act (IX of 1872), section 72.

A person interested in property sold in execution who deposits the amount under Order 21, rule 89 to avoid the sale can sue for the recovery of the money so deposited on the ground that it was made under coercion within the meaning of section 72 of the Contract Act. It is immaterial whether the deposit was or was not made under protest. The payment under Order 21, rule 89 must be unconditional only in the sense that the auction purchaser cannot be required to give security for the money which he withdraws, nor can the depositor impose any condition on his withdrawal of the money or any part of it.

K Vittal Rao for Petitioner.

N Kotyswara Rao and *S Ramayya Nayak* for Respondent.

K S

Happell, J Vasudevan Nambudiripad *v* Madhava Valia Raja.
4th March, 1946 A A A O No 334 of 1944.

Malabar Tenancy Act (XIV of 1930), section 51 (1)—Michavaram due—Commutation before renewal—Crucial date.

Section 24 (2) (*c*) of the Malabar Tenancy Act provides that an order shall be made for the payment of all arrears of rent before an order for renewal is made and " rent " here is clearly used in a general sense and covers michavaram. Michavaram is therefore payable under a specific provision of the Act and the provisions of section 51 (2) can be applied for commuting the paddy rent on the basis of the average prices ruling in the previous five years The commutation cannot be based on the prices prevailing on the dates when the michavaram fell due but must be based on the average prices contemplated by section 51 (1) of the Malabar Tenancy Act.

P Govinda Menon and *D H Nambudripad* for Appellant

C A Vaidyalingam for Respondent.

K.S

Happell, J Adiraja Arasala Kinnyakka Ballel *v* Naranapayya.
5th March, 1946 C R P No. 1054 of 1945.

Madras Hindu Religious Endowments Act (II of 1927), section 78—Application for delivery of property of a temple—Nature and scope of—Order appointing trustee—If can be questioned

An application by a trustee for delivery of properties of a temple under section 78 of the Madras Hindu Religious Endowments Act is in the nature of an application for execution and it is not open to a person objecting to an application for delivery made under that section to question the order of appointment of the trustee who has made the application. Where a person takes no steps to set aside the order of appointment of trustees made by the Board that order becomes final and even if such order is alleged to be one without jurisdiction the question cannot be raised in an application under section 78.

T Krishna Rao for Petitioner.

K Y. Adiga and *K. P Adiga* for Respondent.

K S

Wadsworth, J Venkateswarlu *v* Venkatasubbayya Sastri.
5th March, 1946. A A.O No 222 of 1945.

Madras Agriculturists' Relief Act (IV of 1938), sections 19 and 25-A—Order of Small Cause Court amending its decree—Appealability—New section 25-A—Scope.

Where a Court which passed a decree is a Small Cause Court against whose orders appeals are excluded by the provisions of section 27 of the Provincial Small

Cause Courts Act an order by that Court amending its decree under section 19 of the Madras Agriculturists' Relief Act will not be appealable under section 47 of the Civil Procedure Code. Accordingly, the new section 25-A of Madras Act IV of 1938 confers no right of appeal against such an order

K. Kameswara Rao for Appellant.

N Subrahmanyam for Respondent.

K S

Wadsworth, J Somasundaram Pillai *v* The Official Receiver of South Arcot.
6th March, 1946. C R P No 1155 of 1945

Madras Agriculturists' Relief Act (IV of 1938), *section* 21—*Debtor adjudged insolvent in* 1930 *but obtaining absolute order of discharge in* 1932—*Property continuing in the hands of Official Receiver for satisfying debts—Debtor if entitled to claim benefits of Act IV of* 1938

Where a debtor was adjudicated insolvent but obtained an absolute order of discharge in 1932 but the properties still vested in the Official Receiver for satisfying the debts proved in insolvency, the debts are no longer the debts of the insolvent but merely the debts of the estate vested in the Official Receiver and hence the debtor is not entitled to get the debts reduced under Madras Act IV of 1938 so as to relieve the burden on the estate in the hands of the Official Receiver.

K Srinivasan for Petitioner

T E Ramabhadrachariar for Respondent

K S

Wadsworth, J Ramanathan Chetti *v* Narayanaswami Goundan
7th March, 1946. A A A.O No 151 of 1945

Madras Agriculturists' Relief Act (IV of 1938), *section* 8, *Explanation—Applicability—Integrity of debt broken—Effect*

An indebtedness started with a joint borrowing by three brothers of Rs 500, which debt was renewed in 1926 by another joint promissory note, on which a suit was filed against the two surviving brothers and the sons of the deceased brother, leading to a decree dated 19th July, 1932, for a sum of Rs. 1,334 *plus* Rs 175-4-0 for costs and subsequent interest Somewhere about the year 1934 there was a partition between the three branches of the debtors' family and one branch was required to assume liability for paying Rs 1,000 towards this debt The creditor agreed to the splitting up of the debt and took a mortgage on 30th March, 1934, for Rs 1,000 in discharge of the liability of that branch under the decree The mortgage was to carry interest at 12 per cent The rest of the decree was not discharged and remained the liability of the other two branches In proceedings for scaling down the mortgage,

Held The debt subsisting under the decree having been split up into two portions one portion of which was discharged by the execution of the mortgage the integrity of the original debt has been broken and it cannot be said that that original debt has been renewed or included in the mortgage so as to bring into force the explanation to section 8 of the Act

(1941) 1 M L J 39 ; (1943) 1 M L J 190, applied

(1940) 2 M L J 874, distinguished

K V. Ramachandra Aiyar for Appellant

N Sivaramakrishna Aiyar for Respondent

K S

Chandrasekhara Aiyar, J Karunayanantha Nadar *v* Kuppa Raju
15*th March,* 1946 S A No 464 of 1945

Encroachment—Mandatory injunction to restrain—Delay in applying for—Effect—Relief.

A man who comes to the Court for a mandatory injunction should use due diligence in making the application Mere delay will not be fatal to the application if no mischief is caused thereby to the defendant and the delay does not exceed a reasonable period ; but the right to a mandatory injunction is gone if there has been unreasonable delay, and mischief would be caused thereby to the defendant.

K K Sridharan for Appellant

T P. Gopalakrishna Aiyar for Respondent

K.S.

Chandrasekhara Aiyar, J.

20th February, 1946

Govindaswami Chetty
v.
Ramaswami Chetty.
C. C. C. A. No. 18 of 1945.

Specific Relief Act (I of 1877), *section* 42—*Declaratory suit—Scope—When sustainable—Discretion of Court to entertain.*

Though an action will lie by way of a declaratory suit even against persons who are interested in denying the plaintiff's title, it is not in every suit brought for a declaration that a decree has to follow necessarily. The granting of a declaration is within the discretion of the Court and a Court will be well advised in refusing to exercise its discretion in the plaintiffs' favour when there are circumstances which go to show that the suit is merely an attempt to get the sanction or approval of the Court to a particular claim or contention which the plaintiffs put forward so that their title might be placed beyond any doubt or controversy when any future trouble might arise.

It is for lawyers to advise parties on title and not for the Courts to help litigants when they are in doubt about their right to property.

N. K. Mohanarangam Pillai and *M. V. Gopalaratnam* for the Appellants.

A. Ramachandran, K. M. Bashyam and *Messrs. Pais, Lobo* and *Alvares* for the Respondents.

K.S.

Horwill, J.

1st March, 1946

Subbamma
v.
Madhavarao
C. R. P. No. 763 of 1945.

Civil Procedure Code (V of 1908), *Order* 41, *rule* 11—*Dismissal of appeal* in limine—*Application for amendment of decree—To which Court to be made.*

An order dismissing an appeal in *limine* under Order 41, rule 11 has precisely the same effect as an order dismissing an appeal after notice under rule 32 and an application for amendment of the decree must be made to the Court which has dismissed the appeal and not to the lower Court whose decree has been confirmed.

A. Raghaviah for Petitioner.

B. Lakshminarayana for Respondent.

K.S.

Happell, J.

1st March, 1946.

Balarama Reddi
v.
Govinda Reddi.
A. A. A. O. No. 59 of 1945.

Civil Procedure Code (V of 1908), *section* 144—*Restitution—Sale in execution of* ex parte *decree—Setting aside—Effect—Right to restitution irrespective of any fresh decree that may be passed in the suit.*

Where an *ex parte* decree has been set aside, the fresh decree subsequently passed has no relation to the *ex parte* decree and cannot be regarded as varying it. Irrespective therefore of the nature of the fresh decree, a judgment-debtor is entitled to recovery of his property sold in execution of the *ex parte* decree.

42 M.L.J. 315 and I.L.R. 59 Cal. 647, Referred to.

N R C

2 L W 1066, 43 Bom 235, 14 C W N 182 and I L R. 27 Cal 810, considered.

S. Panchapakesa Sastri and *K R. Krishnaswami Aiyar* for Appellant.

M. S. Venkatarama Aiyar for Respondent.

K S

Happell, J.

4th March, 1946

New Era Banking Corporation, Ltd.
v
Muhammad Ghouse Rowther
C R. P No. 807 of 1945.

Contract Act (IX of 1872), *section* 74*—Chit fund—Rule that in default of payment of subscription within the month the subscriber was to loose benefits and privileges—Validity —If "penalty"*

In the rules of a chit fund there was a provision that if the subscription due for any particular month is not paid within that month the certificate will become lapsed and the holder of such lapsed certificate shall not thereafter be entitled to any benefits or privileges offered by the chit fund. In a suit by a subscriber who had committed default after paying for 9 years and 5 months in respect of a chit for 10 years for recovery of amounts paid by him,

Held, that the provision for the lapsing of the certificate on committing default cannot be said to be penal. Such provisions intended to induce the subscriber to stay in the scheme until its end are integral parts of the scheme itself and a defaulting subscriber is not entitled to relief against the rule on the ground that it is penal The fact that the defaulting subscriber was not a successful bidder at the chit fund auctions does not make any difference.

42 M L J 551, followed.

E R. Krishnan for Petitioner.

S Swaminatha Aiyar for Respondent.

K.S.

Happell, J.

5th March, 1946.

Narayanan Namboodri
v.
Madhavan Nair.
A. A. A O No 58 of 1945.

Malabar Tenancy Act (XIV of 1930), *section* 24 (2) (*c*)*—Arrears of rent payable before application for renewal can be granted—Commutation—Proper mode.*

Where the question of commutation of rent arises in an application for renewal, the arrears of rent payable before a renewal is granted is rent payable under the Malabar Tenancy Act in money within the meaning of section 51 (2) and the commutation should be made in accordance with the provisions of that section on the basis of the average market price of paddy for the previous five years

P Govinda Menon for Appellant.

D A Krishna Variar for Respondent.

K.S.

Happell, J.

5th March, 1946

Varadachariar
v.
Sri Manavala Mahamunigal Temple.
C R P. No. 1100 of 1945.

Civil Procedure Code (V of 1908), *section* 115—*Small cause suit tried as original suit—Appeal—Decision in—If open to revision or second appeal*

If a small cause suit is tried as an original suit by an error and on the basis that it was an original suit an appeal is preferred, an application to set aside the appellate decree will be entertained in revision, as the appellate decree was without jurisdiction. Where, however, the parties joined issue in the trial Court as to whether the suit should be tried as an original suit or a small cause suit and the District Munsiff found that it should be tried as an original suit, an appeal will certainly lie and when in such appeal itself no question of jurisdiction is raised it cannot be contended that the appellate decree was without jurisdiction on the ground that the suit should have been tried as a small cause suit No relief by way of revision can be given to consider the question whether the District Munsiff was right or wrong in treating the suit as an original suit.

R. Sriramachari for Petitioner

A. Srirangachari for Respondent.

K S.

Wadsworth, J

6th March, 1946

Perumal Chettiar
v
Machammal.
A. A A O. No. 235 of 1945.

Madras Agriculturists' Relief Act (IV of 1938), *section* 4 (*h*)—" *Other property*" *Meaning—Undefined right of widow to maintenance out of property of the family of her deceased husband—If* " *other property* "

The undefined right of a widow to maintenance out of the property of the family of her deceased husband cannot be deemed to be " other property " which would disqualify her from the protection of clause (*h*) of section 4 of Madras Act (IV of 1938). The protection afforded by the section would be made illusory if the term " property " is so stretched to its widest possible extent.

[Leave granted]

A V. Narayanaswami Aiyar for Appellant.

K. G. Srinivasa Aiyar for Respondent.

K.S.

Happell, J.

7th March, 1946.

Narayanamurthi
v.
Mangayammal.
C R. P Nos. 979 and 980 of 1945.

Civil Procedure Code (V of 1908), *Order* 23, *rule* 1 (1)—*Withdrawal of suit for partition—Effect.*

It cannot be said that a partition suit should not be dismissed on its withdrawal by the plaintiff simply on the ground that the defendant may be entitled to relief

at some stage; and a defendant who has not acquired any rights in respect of the suit is not entitled to be transposed as a plaintiff on the withdrawal of the suit.

The Advocate-General (*K Rajah Aiyar*) and *D. Narasaraju* for Petitioner.

V. Govindarajachari for Respondent.

K.S.

Wadsworth, J.

7th March, 1946

Rukminiamma *v.* Guravayya.
S A No. 857 of 1944.

Madras Agriculturists' Relief Act (IV of 1938), *section* 8—*Open payment less than interest due—If can be construed as intention to appropriate towards interest only.*

When a payment is in excess of the interest, the excess portion must necessarily have been intended to be appropriated towards the principal. But it cannot be said that when a payment is less than the interest the intention must be to appropriate it towards interest only.

(1942) 2 M.L J. 724, explained.

But where a term in the contract provided " In respect of the document, accounts shall be taken once a year and the interest remaining due *after deducting the payment made till then* shall be added to the principal and as regards the same, I shall pay the interest on the said interest also at the aforesaid rate of interest " when the end of an year is reached, it would no longer be within the capacity of either party to alter the manner of adjustment therein contemplated.

K. Kotayya for Appellant.

V. Rangachari for Respondent.

K.S.

Kuppuswami Ayyar, J.
26th March, 1946.

Ramaseshayya, *In re.*
Cr. R. C No. 1024 of 1945.
(Cr. R. P. No. 958 of 1945).

Defence of India Rules, rule 119—*Order by Commissioner of Civil Supplies—Person prescribing the manner of publication and person notifying it same—Effect—Presumption of validity.*

Where the person said to have directed the notification to be published is also the same person (in this case the Commissioner of Civil supplies) who has signed the notification, the manner of publication must be presumed to be in the manner in which it was published in the *Fort St George Gazette*, especially where there is no suggestion that the officer who passed the order directed it to be published in any different manner.

There is also the usual presumption that an official act has been done properly.

(1945) 1 M.L J. 273, distinguished ; I.L R. 1945 All. 682 and A I R. 1945 Bom. 368, distinguished and not followed

N. V. B. Shankar Rao for Petitioner.

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown.

K.S.

Wadsworth, J.
1st March, 1946

Sankara Kurup *v.* Ryru Nambiar
C R. P. No 437 of 1945.

Limitation Act (IX of 1908), *section* 19—*Endorsement on promissory note* " *amount paid in this* (ithil) *Rs.* 10 "—*If acknowledgment saving limitation.*

In respect of an endorsement on a promissory note " amount paid in this (*ithil* in Malayalam) Rs. 10."

Held, the word " *ithil* " in Malayalam does not necessarily connote the existence of any balance after the payment. The endorsement cannot be regarded as an acknowledgment of liability within section 19 of the Limitation Act.

(1942) 1 M L J. 469 I.L.R. (1942) Mad. 590 (F.B.) and (1941) 2 M L J. 848: I.L.R. (1942) Mad. 405, distinguished. 57 L W. 280 (Headnote criticised as erroneous and decision held not applicable). Same case reported in (1944) 1 M.L J. 347.

P. Govinda Menon for Petitioner.

O. K. Nambiar for Respondent.

K.S.

Rajamannar, J.
4th March, 1946

Rudrayya *v.* Maharajah of Pithapuram
S A No. 1032 of 1945.

Madras Estates Land Act (I of 1908), *section* 112—*Rent decree—Sale in execution—Absence of notice to some of the defendants—Effect—Whole sale if to be set aside*

In execution of a rent decree an extent of 1 acre and 24 cents in the holding was sold as property belonging to the first defendant. But it was found that 1 acre belonged to defendants 2 to 5 who had no notice of the sale and only 24 cents belonged to the first defendant.

Held, the sale in its entirety cannot be set aside In respect of the 24 cents belonging to the first defendant it is valid. The sale can be set aside only as regards the 1 acre belonging to defendants 2 to 5 on the ground that it is invalid because of want of notice to them.

69 M L J. 850, relied on ; 61 M L J. 203 (206) and I L R. 58 Cal. 825, applied ; A.I R. 1940 Pat. 62, distinguished.

D. Narasaraju for Appellant

Ch. Raghava Rao for Respondent.

K.S.

Happell, J.
6th March, 1946.

Narasappa *v.* Chinnarappa.
C. R P. No 851 of 1945.

Civil Procedure Code (V of 1908), *Order* 39, *rule* 2 (3)—*Temporary injunction against defendant subject to undertaking by the plaintiff—Breach of undertaking by plaintiff—Liability to punishment.*

In a suit for a permanent injunction restraining the defendants from interfering with the plaintiff's right to take water to his land, the plaintiff applied for an *interim* injunction against the defendants and this was granted on an undertaking given by the plaintiff that during the pendency of the suit he would not dig a channel in the defendants' land for taking water to his land. The plaintiff dug a channel in contravention of the undertaking. On a complaint by the defendants of a breach of the undertaking,

Held, that the breach would be punishable under Order 39, rule 2, sub-rule (3) of the Code of Civil Procedure as a breach of injunction.

N R C

A.I.R. 1936 Mad. 651, relied on

K. Kuttikrishna Menon and *V. V. Chowdari* for Petitioner.

V. S. Narasimhachar for Respondent.

K.S.

Happell, J.
7th March, 1946.

Kunhy Pakky *v* Narayan Nair.
A. A. A. O. No. 108 of 1945.

Malabar Tenancy Act (XIV of 1930), *sections* 17, 23 *and* 25 (2) (1)—*Scope and effect—Holding including a ware-house to which Act does not apply—Application for renewal of kanom—Sustainability.*

In a suit for eviction under the Malabar Tenancy Act the defendants applied under sections 17 and 23 of the Act for renewal of their kanom which included a ware-house belonging to the landlord.

Held, a renewal under section 25 can be granted only in respect of the whole of the holding. As the ware-house which formed part of the holding could not be included in the renewal deed because the Act does not apply to it, it is not open to the Court to split up and rewrite the kanom in respect of the remaining items of property. The Malabar Tenancy Act does not permit of a renewal of a demise in respect of a part only of the holding.

(Leave to appeal granted.)

D. A. Krishna Variar for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S.

Bell, J.
8th March, 1946.

Vijayal *v.* Nachammai Achi.
A. A. A. O. No. 160 of 1945.

Execution—Pre-decretal agreement that decree was not to be executed against a particular defendant—If can be pleaded in bar of execution.

No executing Court has any right to go behind a decree. Where a decree for money is passed against two defendants and their assets, the assets of both are liable. Any pre-decretal agreement that the decree was to be executed against only the first defendant will be unenforceable there being no consideration for the plaintiff's agreeing not to execute the decree against the second defendant. In any event such an agreement will be an attempt to evade the liabilities of the second defendant which will amount to committing a fraud upon the Court. Such an agreement cannot therefore be pleaded in bar of execution of a decree passed against both defendants in the ordinary way.

N. C. Srinivasan for Appellant.

Respondent not represented.

K.S.

Yahya Ali, J.
11th March, 1946.

Kotiratnam *v* Manikya Rao.
C. R. P. No. 1265 of 1945.

Court-Fees Act (VII of 1870), *section* 7, *clause* (5) *and Article* 17-B—*Suit asking for declaration that plaintiffs were trustees—Necessity to claim possession of properties of trust—Madras G. O. No.* 5791 *of* 17*th May*, 1943—*If applicable—Court-fee payable.*

The plaintiff and the second and third defendants were brothers. With regard to a charity and properties appertaining thereto, there was a trust arrangement under which the trust had to be managed by each of the three brothers by annual rotation. When it was the turn of the third defendant he resigned his trusteeship and the plaint averred that he solicited permission that his place should be taken by his son the first defendant The first defendant managed the institution for a year, but at the end of that period, instead of turning over the management to such other trustee among them as was appointed by the remaining trustees continued to be in possession and refused to deliver the same There were further averments that he committed malfeasance The suit was brought paying a fixed court-fee under article 17-B of the Court-Fees Act.

Held, (1) the trustees cannot sue only for the office without asking for possession of the property belonging to the trust and article 17-B of the Court-Fees Act will not apply to the case. It is covered by section 7 (v) and court-fee payable should be *ad valorem* according to the market value of the subject-matter in dispute

(*ii*) As the plaint altogether denied the character of trustee of any kind to the first defendant, the plaintiff cannot contend that the case falls within the scope of Madras G. O No 5791 of 17th May, 1943, prescribing a reduced fee for a suit for possession or joint possession between trustees.

P. Satyanarayana Rao for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *M Appa Rao* for Respondent.

K.S.

Yahya Ali, J.
12th March, 1946.

Ankamma *v.* Narasayya.
S A No. 64 of 1945.

Gift—Construction—Expression in deed of belief that donee would maintain donor during lifetime—If makes gift revocable—Transfer of Property Act (IV of 1882), *section* 41—*If applicable to confer any equity on the donor.*

The provision in a deed of gift " I have a belief that you would maintain me well during my lifetime And as I bear affection towards you I have got the idea of conveying my property to you. Therefore, I have conveyed to you under *dhakal* the property worth Rs 800."

Held, in the absence of any express reservation of a power of revocation, the donor had no right to revoke the gift (on the ground that the donee failed to maintain him) after he had divested himself of all the right, title and interest in the property by means of gift and after he had duly vested the property in the donee Where the donee was living with the donor the fact that the document was kept in the family box to which both the donor and donee had access does not lead to any adverse inference against the donee who did not take the deed away with him when he left the village.

A I R 1930 All. 669, distinguished.

If the donor had the power of revocation and he validly revoked the gift he became the ostensible owner. If he had no power of revocation at all, he ceased to have any interest or right in the property on his divesting himself of his title in favour of the donee. Therefore there is no question of the donor continuing after the gift to be an ostensible owner and of any equity arising in his favour within the meaning of section 41 of the Transfer of Property Act

N Subramaniam and *D V. Reddi Pantulu* for Appellant

Ch. Raghava Rao and *G. C V. Subba Rao* for Respondent.

K.S.

Chandrasekhara Aiyar, J. Rajagopala Aiyar *v.* Karuppiah Pandithan.
13th March, 1946. A. A O. No. 337 of 1945.

Transfer of Property Act (IV of 1882), *section* 76 (1) *as amended in* 1929—*Scope—Liability of mortgagee for mesne profits after redemption decree—House tax paid by mortgagee after tender of amount due under decree by mortgagor—Cannot be deducted from mesne profits*

Where after the mortgagor has tendered the amount due to the mortgagee under the redemption decree the mortgagee has paid public charges in the shape of taxes for the house property mortgaged, he cannot claim to deduct it from the mesne profits decreed to the mortgagor

There is no warrant for limiting the word "expenses" in section 76 (i) as amended in 1929 to what has to be spent in connection with the management and in respect of the collection of rents and profits Clause (*h*) of the section refers to public charges also as expenses and the mortgagee cannot deduct such expenses. The object of making the provision so stringent against the mortgagee is obviously to see that he does not delay the delivery of possession by the adoption of some device or another.

I L R 47 Mad. 7, distinguished as a decision under the section before its 1929 amendment.

S Ramachandra Aiyar for Appellant.

Respondent not represented.

K S.

Happell, J. Ramanathan Chettiar *v.* Ramanathan Chettiar.
14th March, 1946. C. R. P. No. 105 of 1945.

Court-Fees Act (VII of 1870), *sections* 7 (iv-A) *and* 7 (iv-C)—*Suit by party executing sale deed for declaration that it was sham and nominal—Prayer for cancellation—Necessity—Proper court-fee.*

Where in a suit the plaintiff prays for a declaration that a sale deed executed by him was a nominal and sham transaction and that the vendee had no title to the property covered by the sale deed, a relief for cancellation of the deed must be included and court-fee should be paid under section 7 (*iv-A*) of the Court-Fees Act.

(1944) 1 M.L J 497 and A. I R. 1929 Mad. 478, distinguished ; I.L R. 1940 Mad. 73, relied on.

R. Kesava Aiyangar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *G. N. Chari* for Respondent.

K.S.

Kuppuswami Ayyar, J. Asuram and others, *In re.*
25th March, 1946. Cr. App. No. 1928 of 1945.

Hoarding and Profiteering Prevention Ordinanse (1943), *sections* 9 *and* 13—*Merchants who were not dealers in camphor having a stock and refusing to sell them on the ground that they were not dealers—If offence.*

Where persons are charged with refusing to sell camphor when it was demanded, it is found that though they were in possession of camphor they were not " dealers " in camphor as defined in the Hoarding and Profiteering Prevention Ordinance they are not liable to be punished for the offence with which they are charged.

V. L. Ethiraj for *V. Rajagopalachari* and *T. A. Rajagopal* for Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Wadsworth, J. Satyanarayana Row *v.* Rattamma.
11th March, 1946. C. R P. No. 1134 of 1945.

Provincial Insolvency Act (V of 1920), section 37—Annulment of adjudication—Effect on protection to debtor—Post annulment debt—Suit to enforce—Maintainability.

There is nothing in the Provincial Insolvency Act which gives any protection at all to a debtor whose adjudication has been annulled and there is no prohibition against any creditor after the annulment, particularly in respect of post annulment debts, from filing a suit.

M. Appa Rao for Petitioner.

P. Sivaramakrishnaiah for Respondent.

K S.

Chandrasekhara Aiyar, J. Atchayya *v.* Appalaraju.
14th March, 1946 A. A. O. No. 512 of 1945.

Civil Procedure Code (V of 1908), Order 21, rule 12 (3) (Madras)—Scope—Future mesne profits not claimed in plaint or allowed in decree—If can be ordered on an application.

Order 21, rule 12 (3) (Madras) merely provides for the procedure to be adopted in ascertaining mesne profits. When there was no claim for future mesne profits in the suit and the decree therefore did not award any, the Court has no jurisdiction on an application to proceed to ascertain such mense profits and pass a final decree for such profits.

M. Appa Rao for Appellant.

C. Rama Rao for Respondent.

K S.

Wadsworth, J. Venkatanarayana *v.* Narayanamurthi.
14th March, 1946. A. A. O Nos. 54 and 55 of 1945.

Civil Procedure Code (V of 1908), Order 34, rules 4 (1) and 5—Execution for lesser amount than mentioned in mortgage decree and waiving balance—Sale of property in execution—Deposit—Setting aside—If to be of whole decree amount or the lower amount for which execution was taken out.

The judgment debtor in a mortgage suit cannot get a sale in execution of the mortgage decree set aside by depositing merely the amount for which execution has been taken out together with poundage, etc , when the execution is for less than the amount due on the face of the decree The judgment-debtor cannot get the benefit of Order 34, rule 5 of the Code of Civil Procedure by paying less than the amount contemplated under Order 34, rule 4 (1)

I.L R 57 Bom. 468, not followed; I.L R. 38 Mad. 199 and I.L.R. (1940) 2 Cal. 520, relied on

The Advocate-General (*K Rajah Aiyar*) and *V. Seshadri* for Appellant.

P. Somasundaram, P. Suryanarayana and *P. Satyanarayana Raju* for Respondent.

K.S.

Wadsworth, J. Antony Cruz Nadar *v* Jacob Nadar.
15th March, 1946. S. A No. 2089 of 1944.

Adverse possession—Permanent tenancy—Right to—When can be acquired by prescription.

There is no legal bar to the acquisition by prescription of a right to a permanent tenancy by a person who is in possession without any subsisting tenancy.

62 M.L.J. 496, I.L R. 47 Mad. 337 (P.C) and I.L.R. 7 Pat. 649 (P.C.), considered

K. S. Sankara Aiyar and *V. Sundaresan* for Appellant.

J. S. Vedamanickam for Respondent.

K.S.

NRC

Horwill and Shahab-ud-din, JJ. Neeladri Appadu, *In re.*
19th March, 1946. Crl. R. C. No. 116 of 1946.
(Case Refd No. 5 of 1946).

Criminal Procedure Code (V of 1898), *section* 421—*Summary dismissal of jail appeal —Appeal presented by counsel in Court on behalf of same accused—Jurisdiction to hear.*

When an appeal has been disposed of, the Court is *functus officio* and cannot hear the appeal again Accordingly where a jail appeal has been summarily dismissed under section 421 of the Criminal Procedure Code, the Court has no jurisdiction to hear another appeal presented in Court by counsel on behalf of the same accused and any order passed allowing such subsequent appeal must be set aside. I.L R 46 Mad. 382 and I.L.R 47 Mad. 428, followed ; A.I R. 1943 All. 988 (1) held to be based on the practice obtained in that Court and not followed.

The High Court however will interfere in revision where the ends of justice require it.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

Accused not represented.

K.S.

Happell, J. Thangasami Nadar *v.* Ayyakutti.
21st March, 1946 C. R. P. No. 1556 of 1945.

Limitation Act (IX of 1908), *sections* 19 *and* 20—*Endorsement on promissory note, "Paid Rs.* 3 *only "—If acknowledgment saving limitation.*

Where an endorsement on a promissory note was in these terms " Paid Rs. 3 only " and signed by the debtor,

Held, "Paid Rs. 3 only " is a common form used in cheques and means no more than that Rs. 3 and not any other sum is intended to be paid. If there was nothing else than "Paid Rs. 3 only " it could not be taken as an acknowledgment of liability. Where however the debtor pleads in defence that in effect he did acknowledge the liability the question whether the endorsement amounts to an acknowledgment of liability does not really arise.

G. R. Jagadisan for Petitioner.

K. Venkateswaran for Respondent.

K.S.

Happell, J. Razack Rowther *v* Mahammad Hanif Sahib.
22nd March, 1946. C. R. P. No. 1459 of 1945.

Civil Procedure Code (V of 1908), *Order* 23, *rule* 1 (2)—*Duty of Court to give reasons for order allowing plaintiff to withdraw suit with liberty to institute a fresh suit.*

The reasons for holding that an application under Order 23, rule 1 (2) of the Code of Civil Procedure should be granted must be stated in the order and failure to state them amounts to a material irregularity in exercising jurisdiction.

I L R. 50 All. 199, approved.

The terms of Order 23, rule 1 (2) themselves make it clear that the Court must state either what the defect is or what are the other sufficient grounds which have moved it to grant permission to withdraw from the suit with liberty to institute a fresh suit.

D Ramaswami Aiyangar and *P. S. Srinivasa Desikan* for Petitioner.

S. K. Ahmed Meeran for Respondent.

K.S.

Wadsworth, J.
25th March, 1946.

Ramanamma *v.* Rattamma.
A. A. A. O. No. 2 of 1946.

Execution petition—Order "struck off" because of order of stay under section 20 *of Madras Act IV of* 1938*—No proceedings instituted under section* 19 *of the Act for getting decree scaled down—Effect—New application for execution—If can be treated as revival of the previous petition—Limitation*

A prior execution petition was "struck off" because of an order of stay under section 20 of Madras Act IV of 1938 No proceedings under section 19 of that Act were instituted, so that the stay would cease to operate after 60 days. Subsequently the decree-holder filed an execution petition and sought to treat it as a revival of the previous petition.

Held, the order "struck off" is in substance "adjourned *sine die*" until the Court is apprised of the removal of the bar to further proceedings This may be either by a formal application or by a mere oral request by the advocate to give the adjourned petition a fresh posting. There can accordingly be no question of the subsequent petition by the judgment-debtor being barred by limitation.

B. V. Subrahmanyam for Appellant.

V. Viyyanna for Respondent.

K.S.

Yahya Ali, J.
26th March, 1946.

Ramayya *v* Balakotamma.
S. A. No. 1127 of 1945.

Trusts Act (II of 1882*), section* 6*—Trust—Bequest for* samadhi *with provision that it should be enjoyed by those who perform worship at the* samadhi*—If void for uncertainty.*

A will created a kind of trust in these words : "I have given the B schedule lands for my *samadhi*. That property should be enjoyed by those who perform worship at the *samadhi*" It was contended that the trust in question was void for uncertainty under section 6 of the Trusts Act. Construing the will as a whole,

Held, the provision virtually means that any member of the family who performs worship at the testator's *samadhi* would be entitled to possession. If it is an individual there is no uncertainty whatever. But even if it refers to a class of persons, that class can at any given time be definitely ascertained. There is no uncertainty invalidating the provision.

Ch. Raghava Rao for Appellant.

P. Satyanarayana Rao for 1st Respondent.

K.S

Kuppuswami Ayyar, J.
27th March, 1946

Gangasani Parantahi, *In re.*
Cr. R. C. No. 77 of 1946.
(Cr. R. P. No. 74 of 1946).

Penal Code (XLV of 1860*), section* 425*—Mischief—Winnowing when wind was blowing—Chaff falling on tobacco crop in neighbouring land and damaging it—Liability.*

Where the accused by winnowing his *variga* crop when the wind was blowing with the result that the winnowed particles of the chaff damaged the tobacco crop of the neighbour,

Held, that it cannot be said that the accused did not know that by his act he would be causing loss or damage to his neighbour. Accordingly the accused is liable to be convicted for "mischief."

J. Krishnamurthi for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S

Wadsworth, J. Veeraraghavalu *v.* Fathima Bibi Sahiba.

28th March, 1946 S. A. No. 80 of 1946.

Madras Non-Residential Building Rent Control Order (1942), *clause* 8—*Scope—If ousts the jurisdiction of Civil Courts to grant decrees for eviction of tenants.*

Clause 8 of the Madras Non-Residential Building Rent Control Order, 1945, does not oust the jurisdiction of the Civil Court to give a decree to the landlord for the eviction of his tenant, but merely operates to suspend the execution of the decree during the subsistence of the ban imposed by that order.

(1945) 1 M.L.J. 44, dissented from; (1946) 1 M.L J. 134 and (1946) 1 M.L.J. 135, approved and applied.

V. Damodara Rao for Appellant.

G. Chandrasekhara Sastri for Respondent.

K.S.

Happell, J. Joseph Elias *v* Ameer & Co.

29th March, 1946. C. R. P. No 1071 of 1945.

Sale of Goods Act (*III of* 1930), *section* 37 (2)—*Delivery of larger quantity of goods than contracted for—Right of buyer to reject—Rejection subsequently on the ground of bad quality of goods—Buyer if can rely on right to reject based on larger quantity being tendered.*

The plaintiff, a dealer in eggs at Ernakulam, contracted to send daily two baskets of eggs to the defendant, another dealer in eggs in Bangalore. The plaintiff sent one day seventeen baskets of eggs after receiving which the defendant returned ten baskets on the ground that the whole lot was rotten but retained seven baskets. In a suit for the price of the eggs,

Held, it was not open to the defendant to retain seven baskets and then rest his defence on the plea that the eggs had been sent in excess of the quantity stipulated for in the contract. The buyer may accept the quantity contracted for and reject the rest, or he may reject the whole. Having accepted the seven baskets he should pay for them at the contract rate.

T. A Anantha Aiyar for Petitioner.

N. R. Sesha Aiyar for Respondents.

K.S.

Happell, J Manicka Mudaliar *v* Nagamalai Chetty.
22*nd March*, 1946. C. R P. No 1501 of 1945.

Limitation Act (IX of 1908), Article 75—Applicability—Bond payable in instalments—Whole amount payable on default in payment of any instalment—Default—Suit on bond—Limitation—Starting point

The defendant had executed a bond for Rs 200 on the 17th February, 1932, in which provision was made for repayment in eight instalments subject to a condition that, if default was made in respect of any instalment, the whole amount due under the bond would become immediately payable with interest. The defendant never paid any of the instalments so that default was made and the whole amount became payable with interest on the 18th February, 1933. Small payments towards the amount due under the bond were made by the defendant in 1937, 1940, 1942 and 1943, the first of them being on the 1st May, 1937 The plaintiff filed a suit not on the footing that the whole amount had become due by reason of default but for recovery of the instalments which had become due within three years of the acknowledgment of liability on the 1st May, 1937, when payment towards the bond was made. On the question of limitation,

Held, Article 75 of the Limitation Act applied and there being no waiver by the plaintiff of the default the suit was barred by limitation. No waiver can be inferred merely from the fact that the plaintiff did not file a suit within three years and the few payments made from 1937 onwards are not payments of the instalments giving rise to an inference that the plaintiff had waived the provision that, in default, the whole amount shall immediately become due Nor can the bond sued on be construed as giving an option to the plaintiff either to call up the whole debt or not as he chooses.

R. Desikan and *T V Hari Rao* for Petitioner.

B V. Viswanatha Aiyar for Respondent.

K S

Horwill and Shahab-ud-din, JJ Kumaraswamiah *v* Krishna Reddi.
26*th March*, 1946. A A O No. 590 of 1945.
C R P No 1256 of 1945.

Civil Procedure Code (V of 1908), Order 7, rule 12—Dismissal of application for extension of time to pay deficit court-fee—If operates automatically as rejection of plaint.

The plaintiff filed a suit on a promissory note on the last day of limitation (11—1—1945) with a nominal court-fee and with his plaint filed an application for fourteen days' time to pay the additional court-fee. That application was granted. On 24th January, 1945, the plaintiff filed an application asking for a further ten days' time That application was rejected on 25th January, 1945. The plaint however remained on file until 30th January, 1945, when the Subordinate Judge passed an order that the plaint must be deemed to have been rejected as on 25th January, 1945. But before that order was passed the plaintiff on 29th January, 1945, filed (1) an application for review of the order refusing to extend the time and (2) a petition to extend the time The Judge found that sudden illness of the sons of plaintiff prevented their taking the amount to Court and that was a sufficient ground for review and directed the plaintiff to pay the deficit court-fee by the 26th June, 1945. On revision,

Held, it cannot be said that there was no plaint with regard to which an application for extension of time could be made on 29th January, 1945. Order 7, rule 12, Civil Procedure Code, requires the Court to pass an order when it rejects the plaint giving reasons for doing so That order was not passed until the 30th January, 1945, so that when the money was tendered and the application made on the 29th January, the plaint was still in Court. The plaint did not become automatically rejected upon failure to pay the court-fee within the time allowed The effect

of the order granting review would be to automatically cancel the order of 30th January, 1945, rejecting the plaint.

A Bhujanga Rao and *D R. Krishna Rao* for Appellant.

T K Srinivasathathachariar for Respondent.

K.S

Happell, J Venkatasubba Reddy *v* Ramadoss Reddy.
28th March, 1946 C R P No 1366 of 1945.

Court-Fees Act (VII of 1870), section 12—Registration of suit after some arguments as to question of court-fee—Reservation and trial of question as to court-fee as an issue in the suit—Not barred.

No doubt when the court-fee paid has been accepted without objection and the suit has been determined the Court may be deemed to have decided that the court-fee paid was correct within the meaning of section 12 of the Court-Fees Act even though it has passed no specific order to that effect But while a case is still pending the acceptance by a ministerial officer of the court-fee paid or the registration of the case without objection cannot be deemed to be a final decision of the question of the court-fee to be paid The only final decision is an order of the Court made after it has applied its mind to the question and it is open to the Court to take up and decide the question of the correct court-fee payable at any time before the case is determined provided that it has not already made a considered order. Accordingly though a suit is registered and numbered it is open to the Court to decide the question of court-fee as an issue in the suit itself The mere fact that some arguments on the question of court-fee were heard before the registration of the suit will not be tantamount to a decision that the court-fee paid was correct so as to bar the trial of such question as an issue in the suit.

Decisions of Byers, J , in C R P No 1310 of 1945 and of Bell, J , in C R. P. Nos 562 and 563 of 1945, approved and followed.

M. S Venkatarama Aiyar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *S Ramachandra Aiyar* for Respondent

K.S.

Somayya, J Koyatti *v.* Imbichi Koya.
28th March, 1946 S A No 535 of 1945.

Evidence—Final decree for partition not drawn up on non-judicial stamp paper and not registered—Not admissible in evidence—Stamp Act (II of 1899), *section* 35—*Registration Act (XVI of* 1908), *sections* 17 *and* 49.

It is the obvious duty of the Courts in passing final decrees for partition to insist upon the parties supplying the necessary stamp paper of proper denomination and to have the final decree drawn up on such non-judicial stamp paper. Where a compromise decree for partition is not so stamped under section 35 of the Stamp Act the document cannot be adduced in evidence for any purpose whatever. Further being an instrument of partition as defined under the Registration Act, the final decree has to be registered

Quaere . Whether other evidence is admissible to prove details of the partition in addition to proof of division in status ?

(1944) 2 M L J 164: I L R. 1945 Mad 160 (F.B.) if good law after decision in Privy Council in (1946) 1 M L J. 295 (P.C).

K. P. Ramakrishna Aiyar for Appellant

S R. Subramania Aiyar and *C. D. Venkataramanan* for Respondent.

K.S.

Chandrasekhara Aiyar, J. Padmanabhan *v.* Perumalayya.
21st March, 1946. A. A. O. No. 2 of 1945.

Civil Procedure Code (V of 1908), *Order* 20, *rule* 12—*Scope—Damages for use and occupation—If can be ascertained under the rule.*

It cannot be said that damages for use and occupation cannot be determined under Order 20, rule 12 of the Code of Civil Procedure. It is not necessary for the plaintiffs to file a separate suit for such damages as Order 20, rule 12 covers such a case also and is not confined to claims for mesne profits only.

G. Chandrasekhara Sastri for Appellant

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S.

Yahya Ali, J. Palaniswami Chettiar *v.* Chitraputra Chettiar.
26th March, 1946. S. A. No. 1477 of 1945.

Travancore Nayar Regulation (II of 1100), *section* 8 (1)*—*Marriage of a Nayar lady with a Vellala who had a wife living—Validity.*

The marriage of a Nayar lady with a Vellala who already had a wife living is not valid under the provisions of the Travancore Nayar Regulation. Section 8 (1) of the Regulation governs section 3 which only describes what is required to constitute a valid marriage A marriage though declared to be valid under section 3 can be treated as void under section 8 It is not essential for the applicability of section 8 (1) that the prior marriage also should have been after the commencement of the Regulation. It is only the subsequent marriage which has to be performed after the commencement of the Regulation to make such marriage void. A subsequent marriage performed after the commencement of the Regulation can only mean a marriage performed within the scope of the Regulation and it cannot be said that the subsequent marriage referred to in section 8 (1) is a marriage outside the scope of the Nayar Regulation.

S. Ramaswami Aiyar for Appellant.

S. V. Rama Aiyangar for Respondent.

* Travancore Nayar Regulation (II of 1100), section 8 (1) reads thus : "*A subsequent marriage of a female or of a male during the continuance of a prior marriage, and performed after the commencement of this Regulation is void.*"

K.S.

Chandrasekhara Aiyar, J. Umar Pulavar *v.* Dawood Rowther.
29th March, 1946. S. A. No. 2098 of 1945.

Transfer of Property Act (IV of 1882), *section* 111 (*g*) (*as amended in* 1929)—*Principle that on forfeiture by denial of landlord's title notice in writing determining the lease must be given—Applicability to agricultural leases exempt from its operation.*

Section 111 (*g*) of the Transfer of Property Act as amended in 1929 makes it clear that even in the case of forfeiture by denial of the landlord's title a notice in writing determining the lease must be given. The principle so embodied in the section as a result of this amendment becomes, so to say, a principle of justice, equity and good conscience which must be held to govern even agricultural leases though under section 117 of the Transfer of Property Act they are exempt from the operation of Chapter V of the Act.

K. S. Rajagopalachari for Appellant.

T. L. Venkatarama Aiyar for Respondent.

K.S.

NRC

Bell, J. Virabhadra Rao *v.* Sriramamurthi.
29th March, 1946. C. R. P. No. 1275 of 1945.

Court-Fees Act (VII of 1870), *section* 7 (iv-A)—*Suit by after-born son for partition and setting aside a decree passed against his father and elder minor brother as members of joint Hindu family*—Ad valorem *valuation—Necessity.*

A suit by an after-born son for partition ignoring a decree passed against his father and elder minor brother as members of a joint Hindu family must be valued according to the subject-matter of the suit under section 7 (*iv-A*) of the Court-Fees Act. The plaintiff is bound by the decree until it is set aside and an allegation that the decree was obtained by fraud does not affect the position.

V. V. Sastri for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*), *V. Subramanyam* and *M. Subramanya Sarma* for Respondent.

K.S.

Somayya, J. Murugesa Gramani *v.* The Province of Madras by the Collector of Madras.
2nd April, 1946. C. C. C. A. No. 46 of 1945.

Madras City Tenants Protection Act (III of 1922)—*Applicability to lease of land by the Government—Crown Grants Act (XV of* 1895), *section* 3—*Scope and effect—If prevails over City Tenants Protection Act.*

Section 3 of the Crown Grants Act provides that notwithstanding anything contained in any statute or enactment of the Legislature the terms of the grant should be given effect to Accordingly the Crown Grants Act prevails over the Madras City Tenants Protection Act and the terms of a lease by the Government should be enforced. The lessee is bound by the covenant in the lease to yield up the demised premises with the fixtures and additions thereto in good and tenantable repair and condition at the termination of the lease by efflux of time or earlier determination for any other cause. The lessee in such circumstances will not be entitled to claim the benefits of the Madras City Tenants Protection Act. The receipt of rent of the premises by the *karnam* subsequent to re-entry by Government will not bind the Government.

Difference between powers of private agents and public agents to bind their principal by their acts pointed out.

I.L.R. 26 Mad. 268 at 279, relied on.

K. E. Rajagopalachari and *P. B. Ananthachari* for Appellant.

The Crown Solicitor for Respondent.

K.S.

Horwill and Shahab-ud-din, JJ. Reference by Sessions Judge of Tinnevelly.
8th April, 1946.

Criminal Procedure Code (V of 1898), *section* 240—*Separation of charges against same accused for trial and conviction on one of the charges—Application for withdrawal of remaining charges—Proper procedure—Setting aside of conviction on appeal—Withdrawal of other charges during pendency of appeal—Effect.*

Three persons were charged with murder and theft in a building. The Sessions Judge purporting to act under rule 156 of the Criminal Rules of Practice separated the charges under sections 302 and 380 of the Penal Code and proceeded only with the trial under section 302, acquitted one accused but convicted the other

two who appealed. Before the appeal was heard, the Public Prosecutor withdrew the charge under section 380 against the two convicted persons and they were acquitted of that charge. In appeal, the High Court held that it had not been proved that the accused were guilty of murder but indicated that it would have convicted the third accused under section 411 of the Penal Code had it not been for the circumstances that she had already been acquitted of the charge under section 380, Penal Code.

On a letter by the Sessions Judge of Tinnevelly requesting elucidation of the practice to be adopted in cases where the charges against the same accused are separated for trial and when the accused is convicted on any one of the charges and when the Public Prosecutor applies under section 240, Criminal Procedure Code, for the withdrawal of the remaining charge,

Held, a charge must be framed by the Committing Magistrate under section 210 of the Code of Criminal Procedure against a person committed by him to Sessions. The Code of Criminal Procedure makes no provision for the framing of a fresh charge by the Sessions Court; but section 226 of the Code of Criminal Procedure enables the Sessions Court to add to or alter the charge, or to frame one if the Magistrate omits to do so. Any withdrawal of a charge against an accused would operate as an acquittal and would bar a retrial of the accused on that charge unless section 240 of the Code of Criminal Procedure operated. Section 240 only applies to charges containing more heads than one framed against the same person.

A Sessions Judge confronted with a mixed charge of murder and offence against property should take the charge framed by the committing Magistrate and adopt it. If he wishes to change the charge in any way he should include in the modified charge all the various heads found in the charge of the committing Magistrate, so that it can be seen at a glance that the terms of section 240 would apply. In any case, it is desirable even in the interests of the accused, that the Sessions Judge should not permit the withdrawal of the other charge by the Public Prosecutor until the appeal time in respect of the conviction on the charge has expired and if an appeal has been filed, the appeal has been disposed of.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S

Kuppuswami Ayyar, J. Villupuram Municipality *v.* Panduranga Mudaliar.
12th April, 1946. Cr. R. C. Nos. 977 and 978 of 1945.

Municipality—Complaint by for offence against public health—Sanction of Health Officer—Form of.

Where the complaint by a Municipality contains an endorsement signed by the Health Officer directing the prosecution there is sufficient compliance with the requirement as to the obtaining of the sanction of the Health Officer.

T. K. Subramania Pillai and *M. Annamalai Anandan* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Government.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram* for Respondents.

K.S.

Kuppuswami Ayyar, J. Govinda Rao, *In re.*
17th April, 1946. Crl. R. C. No. 74 of 1946.
(Crl. R. P. No. 71 of 1946).

Factories Act (XXV of 1934), sections 63 and 71—Charge against manager of factory of having obstructed the Additional Inspector of Factories from entering factory premises—Burden of proof.

In a charge against the manager of a factory of having obstructed the Additional Inspector of Factories from entering the factory premises no claim can be made under section 71 of the Factories Act throwing the burden on the accused to show that any other person obstructed because section 63 clearly indicates that there must be a wilful obstruction. If it was wilful obstruction the accused must have been present and obstructed. In the absence of evidence to prove that the accused himself obstructed or that he asked others to obstruct the accused cannot be convicted.

T. Ramamurti for Petitioner.

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown.

K.S

Kuppuswami Ayyar, J.
18*th April*, 1946.

Muniswami Goundar, *In re.*
Cr. R. C. No. 1000 of 1945.
(Cr. R. P. No. 934 of 1945).

Food Grains Control Order (1942), *clause* 3—*Licence issued in name of member of joint Hindu family—Another member helping in the business—If guilty of engaging in the business without licence.*

Where one member of a joint Hindu family takes out a license for a rice trade and another member of the family is only helping in that trade, it cannot be said that the latter was carrying on any business to necessitate his taking out a license required by clause 3 of the Food Grains Control Order (1942).

P. M Srinivasa Aiyangar and *P. V. Srinivasachari* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

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NOTES OF INDIAN CASES.

AKKU PRALHAD *v* GANESH PRALHAD, I L R. (1945) Bom 216

With great respect to the three learned Judges who decided the case, it may be submitted that the rule of Hindu law governing the case lies the other way The question was whether a married woman who had formed an adulterous connection with another and lived as his mistress till his death and continued faithful to his memory thereafter can be regarded as an *avaruddha stri* entitled to maintenance against the estate of the paramour, it being found that the woman's husband was alive at the time of his death The legal implications arising from sexual relationship may depend on the woman's status, whether she is a *patni*, *avaruddha stri*, *bhujishya*, *vesya*, *swairini* or *sadharana stri* There is no express Smriti text specially providing maintenance to a concubine The rights of women other than wives to maintenance are deduced from two texts, of Katyayana and Narada respectively. According to Katyayana, " Heirless property goes to the king except what is required for *yoshit* (योषित्), servants and funeral rites of the deceased etc". Narada states " A king should give (when he succeeds as heir) maintenance to (स्त्रियः) the *women* of a person (who dies heirless) excepting a Brahmin". The terms *yoshit* and *stri* used in the texts, refer according to the Mitakshara, to *avaruddha* women belonging to the deceased. A text of Yagnavalkya[1] dealing with the fine imposable on a person having intercourse with women belonging to another (dasis) indicates the existence of a distinction between *avaruddha* women and the rest . The text is :

अवरुद्धासु दासीषु भुजिष्यासु तथैव च ।
गम्यास्वपि पुमान् दाप्यः पंचाशत्पाणिकं दमम् ॥

—A fine of fifty panas is imposable in regard to intercourse with three types of women, *avaruddha stri*, *bhujishya* and such like women. The terms *avaruddha*, *bhujishya* etc. in the context are according to the Mitakshara but attributes of the word dasi : यदा दास्यः अवरुद्धा भुजिष्या वा भवेयुस्तदा. The particle *cha* (च) in Yagnavalkya's text indicates according to the Mitakshara, *harlots*, *swairinis*, *common women* and *bhujishyas* :

तथा च शब्दान् वेश्या स्वैरिणीनामपि साधारणस्त्रीणा भुजिष्या च ग्रहणम् ।

Having been kept by another they are as good as his wives—परपरिग्रहीतत्वेन तासां परदारतुल्यत्वात्. Though the limits of the fine imposable under the text may be the same, the Mitakshara makes it sufficiently clear that among the dasis, there runs a clear distinction between *avaruddha* women and others. This is borne out by the definitions of *avaruddha* and *bhujishya*. The first of the terms refers to female slaves that are prohibited by the master from having sexual union with other men with an injunction (to prevent the possibility of lapse of service) to stay at home—गृह एव स्थातव्यम्. A *bhujishya* is, however, one who is

1 II, 290.

restricted for enjoyment to a certain number of persons — पुरुषानियतपरिग्रह. In commenting on Yagnavalkya's text dealing with effects not available for partition, the Mitakshara cites a text of Manu[1] which says that "clothes, vehicles, ornaments, cooked food, water, women (स्त्रियः) etc are not liable to partition" and explains (स्त्रियः) as dasis—अवरुद्धास्तु पित्रा स्वैरिण्याद्याः समा अपि पुत्रैर्न विभाज्याः. This no doubt suggests the absence of any distinction between *avaruddha* women and other *dasis* but in the light of the comment on the text of Yagnavalkya adverted to earlier, the last observation should be confined to its context only. Slavery being abolished, the term *dasi* is now equated with a woman of the Sudra caste In view of the foregoing it is now unprofitable to speculate whether the terms "*yoshit*" and "*stri*" in the texts of Katyayana and Narada respectively would subsume concubines of any type at all. - In *Yashvantrav* v. *Kashibai*[2], Nanabhai Haridas, J, observed : "There are texts providing generally for '*women*' of deceased coparceners. It is under those texts that the widows of such coparceners are held entitled to be maintained by the survivors, and they lay down the condition of continued chastity. Whether those text-writers really intended to include in the expression '*women*' concubines or 'kept women' it is now unnecessary to speculate It suffices for us that commentators and judicial authorities have distinctly declared that they are so included But if they are so included, the restriction of continued chastity imposed by the text must equally apply to them, as otherwise they would be in a more advantageous position than the widows" After the ruling of the Judicial Committee in *Bai Nagubai* v *Bai Monghibai*[3], the condition as to residence with the paramour as a member of his household is not necessary and the only point of distinction between an *avaruddha stri* and a *bhujishya* is that the former is restricted to her paramour only while the latter is not so restricted. According to Lord Darling, the concubine (*avaruddha*) possesses a recognised status below that of wife and above that of harlot; "almost a wife, according to the ancient authorities, the distinction of the concubine from the harlots being due to a modified chastity in that she was affected to one man only although in an irregular union merely". If then according to the texts and decisions a concubine will be entitled to maintenance if she is an *avaruddha stri*, can a woman whose connection with her paramour has been adulterous right through be treated as an *avaruddha stri* where the concubinage has been open, exclusive, characterised by fidelity to the memory of the paramour after his death, and resulted in the birth of a child to him? A *swairini* is a woman who abandons her husband and goes to another man of her own varna out of love for him: स्वैरिणी—स्वैरिणी तु पति हित्वा सवर्णं कामतः श्रयेत् । The illicit connection is admittedly adulterous. But the learned Judges argue that if a common prostitute can at any time stick to one man and become an *avaruddha stri* the case of the *swairini* should be regarded as *a fortiori*. The argument is plausible but overlooks that the connection in the latter case constitutes a matrimonial offence. Secondly, it is said that when the husband allows his wife to live in adultery with her paramour so long that their connection may be deemed to be permanent, he must be taken to have *deserted* her and *connived* at her incontinence. The argument is with great respect not convincing. It is the wife that deserts the husband and forms an illicit connection. If the husband is sensitive and anxious to avoid publicity he might well abstain from prosecuting the paramour. Surely this cannot be regarded as the husband "allowing" his wife to live in adultery The Hindu law does not provide for divorce. The husband cannot do anything in the matter because the law provides no remedy before the civil Courts. To talk of the husband as "allowing" his wife to live in adultery or "conniving" at what she has done, is in the circumstances not correct. Thirdly it has been said that the fact that though a concubine may be a married woman when the connection begins she can still be a *dasi* and her son a *dasiputra* provided the connection has ceased

1. II, 119
2. (1887) I L R 12 Bom 26, See also *Bai Monghibai* v. *Bai Nagubai*, (1922) I.L R 47 Bom 401
3. (1926) L R. 53 I.A 153. I.L R. 50 Bom 604 (P.C.).

to be adulterous when the son is conceived (see *Tukaram* v. *Dinker*[1]), shows that the condition as to the connection being non-adulterous is one not imposed by the texts but only on grounds of morality and that too only when a son born of such intercourse claims a share of the putative father's property. It is difficult to follow the argument. Even if the rule be one imposed not by the texts but in the interests of morality it must operate where any claim is founded on such connection and it can hardly make any difference whether it is a claim for property by a son born of such connection or a claim for maintenance by the woman herself. Also the point of time with reference to which the nature of the connection has to be regarded is the time when the particular right may be deemed to have had a foundation. In a claim for a share of property by an illegitimate son the relevant point of time will be the period of his birth when he gets the requisite status ; if at that time the connection had ceased to be adulterous he could not with any show of reason be penalised for something which existed before his birth. Likewise in the case of a maintenance claim by a concubine, no matter what had happened earlier, if at the time of the paramour's death the connection was not adulterous, its previous character would be irrelevant The fourth argument is that the obligation to lead a chaste life after the paramour's death is not impossible of fulfilment even where in fact her husband is alive. The learned Judges remark : "It may be that the husband may file a suit for the restitution of conjugal rights after the death of the paramour, a contigency, which is, in the highest degree remote". The remoteness of the contingency cannot affect the question. The husband's right is a legally protected right and as such cannot be ignored as of little consequence. Fifthly, it has been remarked that the test whether the husband is alive or not at the date of the paramour's death is bound to create an anomalous situtión. In the language of one of the learned Judges · " If the husband dies one day *after* the paramour's death, then the mistress would not be entitled to maintenance : but if he dies one day *before* the death of the paramour, she would be so entitled, because on the day of the paramour's death the husband was dead and he 'was not alive during the whole period of her adulterous connection'. It is difficult to justify this distinction on any logical basis". This line of reasoning makes little allowance for the fact that till the death of the husband the marriage is legally subsisting and all the incidents attaching to a legal marriage, in favour of the husband, can be enforced by him. Another argument of the learned Judges is that equity at any rate would justify the claim of the woman to maintenance. Reliance is placed on an observation of Spencer, J , in *Rama Raja Thevar* v. *Papammal*[2] : " The question is not really so much one of the legal relationship between a man and a woman as of equity that a woman who has been kept for a number of years and given a position almost equal to that of a wife should not be left to starve after the death of the man who kept her" There seems little warrant to justify the application of equitable principles where the connection has been from beginning to end not immoral merely but illegal as well. Yet another argument is that two decisions of the Bombay High Court, *Khemkar* v. *Umiashankar*[3] and *Ningareddi* v *Lakshmawa*[4] had long ago decided, though the particular question was not directly in issue in those cases, that a permanently kept mistress would be eligible for maintenance even if her connection with the deceased paramour had been adulterous and that the repudiation of that view by Shah A C J and Crump, J., in *Anandilal Bhagchand* v. *Chandrabai*[5] was not justified. In *Khemkar* v. *Umiashankar*[3] the parties belonged to the Sompura Brahmin community, who now follow the trade of stone-cutters. The plaintiff, a married woman had deserted her husband and remarried another, the prior marriage being undissolved. On the death of the second husband a question arose as to her rights. The Court held that the second marriage having taken place during the subsistence of the first marriage was invalid and cannot give the woman any rights as a wife but that she will be entitled to maintenance from the estate of the deceased as his concubine. The facts do not disclose whether the

1. (1930) 33 Bom L R 289
2. (1925) L I R 48 Mad 805 49 M L J 348
3 (1873) 10 Bom H C R 381.
4 (1901) I L R. 26 Bom 163
5. (1923) I.L.R. 48 Bom. 203.

first husband was alive at the time of the paramour's death and the question whether that circumstance would have made any difference in the result can now be only a matter of speculation Anyway, the decision cannot be regarded as really helpful on the question. In *Ningareddi's case*[1] the parties were Sudras, and the woman had deserted her husband and lived as the paramour of another till his death. A gift of joint family property had been made by the latter to his mistress and on his death its validity was impugned. The Court held that the gift was untenable but that maintenance was payable to the woman out of the estate. In the course of his judgment, Crowe, J., observed : " There can be no doubt on the authorities that a concubine is entitled to maintenance though the connection was an adulterous one, provided that it was of a permanent nature". Here again it falls to be observed that there is nothing in the statement of facts to show that the connection which at its inception was adulterous had ceased to be so at the time of the paramour's death. In those circumstances, in *Anandilal Bhagchand* v. *Chandrabai*[2], the learned Judges felt that the matter had neither been directly nor conclusively decided by the two earlier cases, and after examining the texts and authorities they laid down that a concubine cannot claim maintenance as an *avaruddha stri* where her connection with the deceased had throughout been adulterous. In Mayne's Hindu law, 9th edition at p 450, it had been stated on the strength of the earlier Bombay decisions, that maintenance could be claimed in such a case, but in the 10th edition at p. 824 not only has that statement been omitted but *Anandilal's case* is referred to without any criticism. It is true that a wife who leaves her home for purposes of adultery and persists in following a vicious course of life cannot claim to be maintained or to be taken back, *Ilata* v *Narayana*,[3] *Debi Saran Shukul* v. *Daulata Shuklain*,[4] *Subbayya* v. *Bhavane*,[5] *Kandasami* v *Murugammal*[6]. Chandavarkar J., was no doubt inclined to hold that even such a wife would be entitled to some amount of maintenance, see *Parami* v *Mahadevi*[7], but this view has not been accepted. There can, however, be no doubt that if she repents, returns to purity and performs expiatory rights she will be entitled at least to bare maintenance, *Bommayya* v. *Hegade*,[8] *Ram Kumar Dube* v. *Bhagwanta*,[9] *Mt. Shibbi* v. *Jodh Singh*,[10] *Haji Saboo Siddhick* v. *Ayeshabai*[11], *Bhikubai* v *Hariba*[12] This is by virtue of the fact that unchaste life does not put an end to the marital tie with the result that the husband's obligation to maintain her is not extinguished but is only kept in suspense during her adulterous life. The obligation is personal. Also adultery is an offence in India and it will be rather strange if a right is founded and sustained on the basis of an act which constitutes an offence *Ex turpi causa non oritur actio.* In the absence therefore of any specific texts of Hindu law under which a *swairini* can be regarded at any time as an *avaruddha stri* there seems to be no warrant to uphold any claim for maintenance by her as against her paramour's estate It is true that in *Bai Nagubai* v. *Bai Monghibai*[13], the Privy Council refers to *Ningareddi's case*,[1] as one whose authority has not been questioned. This is no doubt true, but the real question is what it is that that case has decided As already pointed out the observation of Crowe, J., that a concubine is entitled to maintenance though the connection was adulterous cannot be read as meaning that she will be entitled to maintenance though the connection was adulterous all through, particularly as there was nothing to show that in that case the husband had survived the paramour." "P."

GOVIND BHAUSHET *v.* BHIKU MAHADEOSHET, I L R. (1945) Bom 10

One of the rules of Hindu law, a repeal of which was prominently urged before the Hindu Law Reform Committee, was that governing priority among daughters in the matter of inheritance to parents The decision under notice had to consider whether an unmarried daughter living as a permanently kept concubine of another

1. (1901) I L R. 26 Bom 163
2. (1923) I L R. 48 Bom 203
3. (1863) 1 M H C R 372
4. (1917) I L R. 39 All 234
5. (1914) 24 I C. 390
6. (1896) I.L.R. 19 Mad 6
7. (1910) I.L R 34 Bom. 278.
8. (1914) 27 M.L J. 305.
9. (1934) I L R 56 All 392.
10. (1933) I L R. 14 Lah 759
11. (1903) L R 30 I A. 127 : I L R 27 Bom 485 (P C.).
12. (1925) I L.R 49 Bom 459.
13. (1926) L R 53 I.A. 153 : I.L.R. 50 Bom 604 (P.C).

cannot inherit the property of her father either to the exclusion of or along with his married daughter. The question was answered in the negative. The Mitakshara divides daughters into two classes for purposes of priority—unmarried (अनूढ) and married (ऊढ)—the rule being postulated that an unmarried daughter excludes a married daughter The preference is indicated on the authority of texts of Parasara and Devala The unmarried daughter is referred to therein as *kumari* (कुमारी) and *kanya* (कन्या) respectively The Mitakshara treats these terms as convertible with *anudha* The term *kanya* seems to signify two ideas One is that the girl is *ananya purvika* (अनन्यपूर्विका). Medhatithi's comment on Manu IX, 132 emphasises the fact that a *kanya* is one who has not been enjoyed by a man Secondly that the girl is under the protection of her father These ideas carry with them the further incident that the girl is fit for *kanya-pradana* according to shastraic rites. The married woman according to the texts of law is one that has been given in valid marriage by the performance of the necessary rites By reason of these distinguishing features each class of daughters has a distinctive status which, in *Tara* v *Krishna*[1], was characterised as *kanyavastha* and *bharyatwa* respectively It follows therefore than an unmarried daughter living as the concubine of a person is *prima facie* neither a *kanya* or a *kulastri* Again it may well be that under the scheme of the shastras such a daughter was not intended to be invested with heritable capacity since immorality on her part would have led to excommunication from caste and ostracism, marking her a *patita* and as such excluded from inheritance In view of the passing of the Caste Disabilities Removal Act (XXI of 1850), this disqualification can no longer operate Still the Courts might have refused to recognise the heritable capacity of such a daughter on the ground that the Mitakshare does not contemplate a right of inheritance for her, for whatever reason it may be and whether the reason has continued to be valid or not Having regard however to the fact that under the smriti texts it is the daughter as such that is mentioned, there would be slender warrant for restricting the meaning of the term to maiden and married daughters only It was for this reason that in *Advyapa* v. *Rudrava*[2], it was held that incontinence will be no bar to succession by a daughter and that to be qualified to inherit there is no rule that a daughter should be *avyabhicharini* or *sadhvi* No doubt that was a case of a married daughter living a life of immorality but the principle will equally apply to a case of a maiden daughter living such life Even if the heritable capacity of a maiden daughter leading a life of immorality be recognised, it would still be necessary to assess her position among the daughters of the deceased in regard to the regulation of priority. In *Tara* v. *Krishna*[1] a *murali*—a maiden dedicated to an idol—who had taken to a life of promiscuous intercourse claimed to inherit to her father in competition with married daughters of the deceased It was held that such a daughter was neither a *kanya* nor a *kulastri* and cannot take while a daughter of either class existed. Apropos of this conclusion a scholar wrote . " A *murali* is a female married to a deity when she was a virgin She has a legal status under Pancharatra Shastra and Shiva Agama She is a married woman for the purpose of inheritance Though she is allowed promiscuous intercourse to the extent defined by the Shastra, *viz*, Pancharatra, and Agamas, she is not a prostitute according to these laws . . . She is a married woman as females are in several countries, who are not prohibited from having promiscuous intercourse, as defined and permitted by their laws or customs. The *murali* in the Bombay case is a married daughter and not a prostitute as held by the Bombay High Court As such she was entitled to one third of the estate of the father"[4]. Even if a maiden dedicated to an idol is in a sense to be regarded as a married person, still it is clear that such terms as *kanya* or *barya* should in the context of the discussion relating to inheritance in the Mitakshara be understood in the popular sense (*lokaprasiddha*) and not in the technical (*paribhasika*)

1. (1907) I L R 31 Bom 495
2. (1879) I L R. 4 Bom. 104.
3. (1907) I L.R. 31 Bom. 495.
4 Dewan Bahadur Raghunath Rao, *Times of India*, 11th December, 1909.

sense. Nor can the text of Yagnavalkya[1] imposing a fine of 50 panams for intercourse with *avaruddha*, *bhujishya* and such women as explained in the Mitakshara that that is so since they are as good as other's wives (परपरिगृहीतत्वेन परदारतुल्यत्वात्) be understood as concerning anything other than *strisangrahana* or as conferring by implication on a maiden daughter dedicated to an idol or leading an immoral life as the exclusive mistress of any person the status of a wife. That the status of a daughter living in immorality is different from that of a *kanya* or a *kulastri* is clear also from a text of Vyaghra "In the case of sadharana stri there is no (such thing as) adultery, which is a term applicable to (a married woman) of (recognised caste) or the defilement of a *kanya*; or the defilement of one's preceptor's bed ". There is no adultery in these cases because the woman is not married, nor is there *kanya-dushana* because she is not a maiden. Thus the daughter who had taken to an immoral life and had never been married is neither a maiden nor a married woman and as such even if she has heritable capacity can take only in the absence of those classes in accordance with the maxim आगन्तूनामन्ते निवेशः. The only difference between the case under notice and *Tara* v *Krishna*[2] is that whereas in the latter case the daughter was a *murali* who had taken to a promiscuous life, in the former she had become a concubine in the permanent keeping of another even while she was a maiden On the reasoning indicated *supra* this can hardly affect the rule as to priority of succession as between the daughters of a deceased person " P. "

VYAS JIWANLAL *v* THAKARDA RAMTUJI, I L.R (1945) Bom. 46

This decision deals with the interesting question whether and if so under what circumstances " bonus " could be regarded as " wages " and as such exempt from attachment in execution of a decree Section 60 (1) clause (*h*) of the Civil Procedure Code exempts from attachment or sale in execution of a decree the wages of labourers and domestic servants In the Payment of Wages Act (IV of 1936) it is stated in section 2 (*vi*) that " ' wages ' means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied were fulfilled, be payable whether conditionally upon the regular attendance, good work or conduct or other behaviour of the person employed, or otherwise to a person employed in respect of his employment or of work done in such employment, and includes any bonus or other additional remuneration of the nature aforesaid which would be so payable and any sum payable to such person by reason of the termination of his employment." The definition contemplates that " wages " are remuneration payable in respect of employment to an employee under a *contract* of employment express or implied. Bonus also will fall within the ambit of the term if so payable It follows that any remuneration which may be paid independently of the contract of employment may not fall within the scope of wages. Section 2 (1) (*m*) of the Workmen's Compensation Act (VIII of 1923) states that " wages " includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment The latter definition does not mention that the remuneration payable should be under the terms of the contract of employment if it is to be regarded as wages. The term " benefit " may *prima facie* cover a bonus as well. These definitions being however in respect of special pieces of legislation, in assessing the scope of the term " wages " in section 60 of the Civil Procedure Code, light may have to be sought outside such legislation. While the dictionary meanings agree that wages are compensation paid to a hired person or employee for his services there is no unanimity regarding the meaning of the term " bonus " Thus while Wharton refers to " bonus " as an occasional extra dividend or a gratuity, Bouvier states that " bonus " is not a gift or gratuity but is paid for some services or consideration and is in addition to what would ordinarily be given. Adopting the definition of " bonus " as given in the New English Dic-

1. II, 290. 2 (1907) I.L.R. 31 Bom. 495.

tionary, Stirling J, remarked in Re *Eddystone Mar Insurance*,[1] that " bonus " is " a boon, or gift over and above what is nominally due as remuneration to the receiver " The English view would thus seem to be that " bonus " is in the nature of a gift or gratuity and therefore proceeds altogether as a matter of grace on the part of the employer and not as a matter of right inhering in the employee In *Deane* v. *Wilson*,[2] where what was called a bonus was a sum per week additional to stated wages and was payable only when the person had been punctual and regular in attendance, it was held that it was not ' wages ' within the meaning of section 25 of the Truck Act which defined " ' wages ' as any money or other thing contracted to be paid, delivered or given as a recompense, reward or remuneration for any labour done or to be done, whether within a certain time or to a certain amount or for a time or for an amount uncertain " Except for the fact that the payment was conditional there seems to be no reason why the sum could not be regarded as wages particularly as it fell to be paid as an incident of the contract of employment. The argument that merely because a bonus was a conditional payment and might or might not be payable it could not be regarded in assessing the " remuneration " payable to an employee, was expressly rejected in *Skailes* v. *Blue Anchor Line, Ltd* [3]. The position is reinforced by the remarks of the Earl of Birkenhead in *Sutton* v *Attorney General*[4], where he observed " The term ' bonus ' may of course be properly used to describe payment made of grace and not as of right but nevertheless may also include, as here, payments made because *legally due* but which the parties contemplated will not continue indefinitely " It would thus seem that neither its conditional character nor the indefiniteness of the duration for which it may be paid would be material for determining whether the payment can be regarded as " remuneration " in respect of service ; and that the true test is whether it was altogether a matter of grace It would therefore be a question depending on the facts of each case In the case under review, on a representation made by the Textile Labour Association of Ahmedabad to the Ahmedabad Mill-owners Association that the wages of the employees were inadequate and that in view of the prosperity of the mills and of the hardships suffered by the employees due to the inadequacy of their wages in the abnormal economic conditions caused by the war the wages of the employees should be increased, an agreement was arrived at between the two bodies in January 1943, which recited, that in view of the exceptional circumstances in Ahmedabad it was decided to give all the employees of the Textile Mills, a regulated scale of bonus which in the first place will be based on the different kinds of work done by the employees and secondly will be regulated according to the number of days for which each employee worked in each calendar month. This was the scheme for the payment of the bonus Having regard to the fact that the payment is to be an additional remuneration to each employee and flows out of the contract of employment as modified by the subsequent agreement, neither the fact that the payment was only temporary and for an indefinite period nor the fact that it was conditional can detract from its character as " remuneration " for service and as such the sum payable will constitute " wages of labourers " within the meaning of section 60 of the Civil Procedure Code.

SHRIPAD APPAJIRAO *v* SECRETARY, THE SANIKATTA CO-OPERATIVE SALT SALE SOCIETY, LTD, I L R. (1945) Bom 209

This decision deals with the question as to when an agreement is one for stifling prosecution and would be opposed to public policy. The defendant's brother had misappropriated five consignments of goods entrusted to him for delivery by a Co-operative Society and absconded A complaint was lodged by the Society with the Police in regard to the matter. The defendant was a clerk in the Sub-Court at the place where the complaint had been filed He started negotiations with the Secretary of the Society. The latter refused to withdraw the complaint against the defendant's brother but ultimately agreed to give a letter to the District Superintendent of the Police stating that the Society had no objection to the dropping

1. (1894) W N 30
2. (1906) 2 I.R. 405.
3. (1911) 1 K B 360
4. (1923) 39 T L.R. 294.

of the case against the defendant's brother Thereupon a promissory note was executed by the defendant in favour of the Society to cover a part of the loss sustained by it and certain other items of consideration were also passed for recoupment of the loss The withdrawal of the prosecution was not permitted by the District Magistrate · The prosecution of the defendant's brother proceeded and resulted in his conviction The amount due under the promissory note being unpaid, the Society sued on the note It was pleaded that the note was given as part of the consideration for a promise by the Secretary of the Society to withdraw criminal proceedings against the defendant's brother If established, this would plainly afford a defence under section 23 of the Indian Contract Act. It was argued that there was no stifling of prosecution in this case, because, (i) the Secretary of the Society had *no power* to withdraw the complaint ; (ii) the Secretary had *in fact refused* to withdraw the prosecution ; (iii) the prosecution despite the letter of the Secretary to the District Superintendent of Police was in fact *proceeded with* and (iv) even if the parties had contemplated the withdrawal of the prosecution, at best it operated only as a *motive* that impelled the execution of thepromissory note but did not form part of the consideration therefor It is true that there is undoubtedly a distinction between the motive to a transaction and its object or consideration and it is not sufficient to avoid an agreement as being repugnant to public policy that the motive of the party undertaking the liability was the withdrawal of a pending criminal case If the undertaking is unenforceable it can only be, because the object or consideration for the undertaking or any part of it is opposed to public policy. As pointed out in *Sudhindra Kumar* v. *Ganesh Chandra*,[1] the test is whether it was a term, express or implied, of the bargain between the parties that a non-compoundable case should not be proceeded with In the words of Lord Atkin in *Bhowanipur Banking Corporation, Ltd.* v *Durgesh Nandini Dasi*,[2] " Proof that there has actually been a crime committed is obviously unnecessary But it is also of course necessary that each party should understand that the one is making the promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged It would be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised On the other hand to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interests of justice, and must not seek his own advantage. It only remains to say that such agreements are from their very nature seldom set out on paper. Like many other contracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances." The question therefore is one of fact whether there was a promise not to prosecute or continue prosecuting. In *Jones* v. *Merionethshire Permanent Benefit Building Society*,[3] a prosecution for defalcation as against the Secretary of a Society had been threatened by the Society. The plaintiff undertook to make good the losses, the expressed consideration being a forbearance by the Society to sue the Secretary in respect of the loss caused Promissory notes were executed on that footing. In giving the notes the plaintiff's motive was to save the Secretary from prosecution and this was known to the Directors of the Society but there was no promise not to prosecute. In an action to set aside the notes as obtained for an illegal consideration Vaughan Williams, J., held that it was an implied term of the agreement that there should be no prosecution and hence the notes were unenforceable. This ruling was approved by the Privy Council in *Kamini Kumar Basu* v. *Birendra Nath Basu*,[4] and was fully considered in *Bhowanipur Banking Corporation Ltd.* v. *Durgesh Nandini Dasi*[2]. Also it is immaterial if in spite of the agreement the prosecution was actually conducted, for what is material is the consideration or object and not what happened subsequently.

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1. A.I.R. 1938 Cal 840
2. (1941) 2 M L J 726 (1941) L R 68 I A. 144 (P C.)
3. (1891) 2 Ch. 587 ; s c. on appeal (1892) 1 Ch 173
4. (1930) L R 57 I A. 117 59 M L J 82 (P.C).

RAMCHANDRA BALAJI *v* SHANKAR APPARAO, I L R (1945) Bom 353

In *Anant* v *Shankar*,[1] after observing that the fraction which is at any time employed to describe the quantum of interest of a male member of a Hindu Joint family does not represent his rights while the family is joint but the share which he would take if a partition were then to be made and that his interest is never static but increases by survivorship as others die and lessens as others enter the family by birth, adoption, etc; the Judicial Committee propounded the question "what principle requires that the death of the last surviving coparcener should prevent any further fluctuation of the interest to which he was entitled notwithstanding that a new male member has since then entered the family by adoption" Answering that there is none, the Privy Council approved the view of the Nagpur High Court in *Bajirao* v *Ramkrishna*[2] "We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings in a new male member." Accordingly the Privy Council held overruling *Baloo Sakharam* v *Lahoo*[3], that the power of a widow of a predeceased coparcener to adopt to her husband does not come to an end on her son dying unmarried by reason that he was the sole surviving coparcener in the joint family and his property had vested in a person other than the adopting mother, and that the adoption must vest the property in the adopted son displacing any title based merely on inheritance from the last surviving coparcener Then the question arose whether the rule equally govern where the joint family is put an end to by partition among the surviving members and thereafter the widow of a predeceased coparcener adopts In Bombay, in a series of decisions it had been held that the adopted son cannot in such circumstances reopen the antecedent partition and claim his father's share In *Anant* v *Shankar*[1], the Privy Council had referred with approval to the ruling of the Madras High Court in *Veeranna* v *Sayamma*[4], which had held that an adopted son cannot question alienations made prior to the adoption by an intermediate full owner who had taken the property on the death of the adoptive father. The question thus narrowed itself to this, namely, whether a partition can be regarded as an alienation In *Sankaralingam* v *Veluchami*[5], such a contention was rejected. It was stated "The partition does not mean the extinction of the family The members of the family are still there and *so are the family assets*" And the learned Judges decided that a son adopted to a deceased coparcener is entitled to reopen a partition of the family properties effected by the surviving coparceners before the adoption took place This decision was referred to, seemingly with approval, by the Privy Council, in *Anant* v *Shankar*[1] The contrary view of the Bombay High Court is found in *Bammangouda Shankargouda* v *Shankargouda Rangengouda*[6], *Hirachand* v *Rowji Sojpal*[7], and *Irappa Lokappa* v *Rachayya Madiwalayya*[8] All these decisions had applied the principle laid down in *Baloo Sakharam* v *Lahoo*[3], that where at the time of the adoption the coparcenary had already become extinct, the adoption will not revive the coparcenary and enable the adopted son to claim his father's interest This Full Bench ruling was overruled by the Privy Council in *Anant* v *Shankar*[1], which, in effect, laid down that the existence of a coparcenary at the date of the adoption is not material for the validity of the adoption which falls to be decided altogether on grounds of spiritual benefit and that when once a valid adoption is made it cannot be denied effect, hence the rights of the adopted son would date back to the death of the adoptive father The reasoning being general, the principle will operate whether the termination of the coparcenary prior to the adoption had resulted either from the death of the sole surviving coparcener or by a partition effected among the surviving coparceners Nor does the

1 (1943) 2 M L J 599 L R 70 I A 232 I L R (1944) Bom 116 (P C)
2 I L R. (1941) Nag 707, 718
3 I L R (1937) Bom 508 (F B)
4 (1928) 56 M L J 401 I L R 52 Mad
5 (1942) 2 M L J 678 I L R (1943) Mad 309 (F B)
6 (1943) 45 Bom L R 1021
7 (1938) 41 Bom L R 760
8 (1939) 41 Bom L R 1300

view in *Waman* v *Ganpat*[1], that a partition of the joint family property between coparceners of the family amount to a transfer within the meaning of the term in the Transfer of Property Act militate against the above conclusion For though a partition may be a transfer for purposes of the Act it may not amount to an *alienation* as contemplated in *Veeranna* v *Sayamma*[2], inasmuch as partition merely effects a change in the mode of enjoyment as between the parties to it of property which till then was being enjoyed jointly and to which they had already title

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PANDURANG BHAU *v* CHANGUNABAI, I L R (1945) Bom 487

This case also deals with a question of adoption, short and interesting A member of a joint and undivided Hindu family had died in 1932 leaving him surviving a widow and two sons The elder son died in 1933 leaving a widow and the younger son also died shortly afterwards Sometime later, the mother adopted a boy to her husband The question was, whether, in the circumstances, the adoption was valid In *Ramkrishna* v *Shamarao*[3], it had been held by the Bombay High Court that where a Hindu dies leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived This principle was approved by the Judicial Committee in *Amarendra Mansingh* v *Sanatan Singh*[4] While reiterating what has been characterised as the "conventional view" as to the religious efficacy of sonship, the Privy Council at the same time recognised that "there should be some limits to the exercise of the power of adoption, or at all events some conditions in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance or inequitable in the face of other rights to allow it to take effect" Such a situation was held to arise "where the duty of providing for the continuance of the line for spiritual purposes which was upon the father and laid by him *conditionally* on the mother has been assumed by the son and by him passed on to a grandson or to the son's widow" In such a case according to the Privy Council "the mother's power is gone." Two remarks fall to be made One is that the mother's duty to continue the line is not absolute but altogether *conditional* Secondly, that where the duty has been assumed by the son and passed on to a grandson or to his widow the mother's power is *gone* The reason is that when either the grandson or daughter-in-law has become burdened with the duty, an adoption by such person will satisfy not merely the spiritual requirements of the son but also of his father Whether an adoption is actually made is immaterial The responsibility having been definitely transferred by the law to the grandson or the son's widow there is no scope for the continuance of the power of adoption in the mother, as a sort of reserve in the background, analogous to that of a surety In that view it matters little whether there were more than one son left by the father It is true that in *Amarendra's case*[4], the Privy Council indicated that the test is "whether the conditions exist at the time of the son's death." To construe it as meaning "at the time of the death of the last surviving son" would be an extension. If at the time of the death of any of the sons, there is left by him either his own son or his widow, the mother's power to adopt perishes To talk of the determination of the mother's power it is not necessary that the power should have actually fallen to be exercised The power was all along there conditionally and because of the happening of an event, namely, the son dying leaving his own widow as a *means* to continue the line, the power is extinguished A case analogous to the case under review was that in *Anant Govind* v *Dnyaneshwar Balkrishna*[5]. There one *B* had died leaving a widow *Y* and two sons *V* and *A* The latter was married but had no issue He died on 2nd October, 1901, and his wife a few days later. The other son *V* died unmarried four or five years later Thereafter *Y* adopted The Bombay High Court held the adoption to be valid. The learned Judges held that the crucial point of time

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1 (1935) 37 Bom L R 925
2 (1928) 56 M L J 401 I L R 52 Mad 398.
3 (1902) I L R 26 Bom 526
4 (1933) 65 M L J 203 L.R 60 I A 242 : I L R 12 Pat 642 (P C)
5 I L R. (1944) Bom 218

was the death of *V* He had died unmarried and his mother was therefore according to them in a position to adopt to her husband It is open to doubt whether *V's* death was the moment to be considered in regard to the assessment of the mother's power to adopt If *A's* widow had adopted *Y's* power would have gone The fact that she had not done so is of little significance; for it was the existence of *A's* widow that put an end to *Y's* power In the case under review the elder son's widow was alive and it is not as if there was no method of continuing the line. In the circumstances, it is difficult to accept the view that the mother's power to adopt still exists

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NARASINJI VANNECHAND FIRM, GUNTUR *v* NARASAYYA, (1945) 1 M L J 312.

It is a question that frequently arises whether an auction purchaser can sue for refund of the purchase money or a proportionate part of it by the decree-holder, where, after confirmation of the sale it is decided in proceedings instituted by third parties that the judgment-debtor had no title to the properties sold in execution or to any portion of such properties Judicial opinion is not uniform In Madras and Lahore it has been held that the Court auction purchaser can sue for refund where the judgment-debtor's title to the properties has been found non-existent; other High Courts have taken a different view Roman Civil Law always implied a warranty of title on the part of the vendor of land—*sive tota res evincatur, sive pars, habet regressum emptor in venditorem*[1] The English Common Law was different. There it was laid down that "if a man buy lands whereunto another had title which the buyer knoweth not, yet ignorance shall not excuse him By the civil law as observed by Sir Edward Coke, everyman is bound to warrant the thing that he sells or conveys, albeit there be no express warranty, but the common law binds him not, unless there be a warranty, either in deed or in law, for *caveat emptor qui ignorare non debuit quod jus alienum emit*—let a purchaser who ought not to be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution"[2] Statute law like the Conveyancing Act, 1882 and the Law of Property Act, 1925, however provided that covenants of title are implied in a conveyance in England A similar provision is found in India in section 55 (2) of the Transfer of Property Act But there is no provision giving a warranty of title in regard to an auction sale Sections 257 and 258 of the Civil Procedure Code of 1859 gave the auction purchaser a restricted right of recovery The Code,—Act X of 1877,—contained a larger provision which was reproduced in the Code of 1882 (Act XIV of 1882) Section 315 laid down "When a sale of immoveable property is set aside under section 312 or section 313, or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money from any person to whom the purchase money has been paid. The repayment of the said purchase money may be enforced against such person under the rules provided by this code for the execution of a decree for money" The first part clearly refers to the setting aside of the sale by the execution Court The next para does not refer to any section specifically and so it fell to be argued that it contemplated that a suit could be brought for the refund of the purchase money If it did not so contemplate the provision would be but a repetition of section 313 which also dealt with a sale being set aside on the ground that the judgment-debtor had no saleable interest It was consequently held that the latter part of the paragraph provided for a suit being brought for the refund of the purchase money Whether in doing so the Codes of 1877 and 1882 were introducing a new provision or were merely affirming what had been the true position at Common Law has been the subject

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1 Digest, 21, 2, 1
2 Broom's Legal Maxims, 7th Edn, pp 579-80, *see also Gwillim* v *Stone*, (1895) 2 Q B. 616

of conflicting dicta The conflict assumes importance by reason of the fact that in the Code of 1908 there is no provision corresponding to the second half of section 315 in favour of the auction purchaser In *Amarnath* v *Firm Chotelal*,[1] a Full Bench of the Allahabad High Court held that the auction purchaser's rights are now confined to Order 21, rule 91, that he has to apply thereunder to the execution Court within 30 days of the auction sale in accordance with Article 166 of the Limitation Act and that where he has made no such application and the sale has been confirmed under rule 92 the Code gives him no further right and if in a third party's action the judgment-debtor is declared to have had no interest in the property sold the auction purchaser cannot bring a suit for the recovery of the purchase money In *Amal Chandra Banerjee* v. *Ram Swarup Agarwalla*[2], Edgley, J, took a similar view He observed "The purchaser is restricted to his remedy by an application under rule 91 which must be made within thirty days from the date of the sale under Article 166 . • followed by an application under rule 93 which may be made within three years from the accrual of the right under Article 181" He also agreed that "outside the provisions of the Code of Civil Procedure an auction purchaser has no right to recover his purchase money merely by showing that the judgment-debtor had no saleable interest" The Lahore High Court in its decision in *Mehr Chand* v *Milkhi Ram*[3], has inclined to a different view Jai Lal, J, observed "In the absence of a clear indication to the contrary it is not permissible to assert that section 315 created a substantive right in favour of the auction purchaser which did not originally exist On the other hand it is more in accord with the object of the code to hold that the section was intended to provide the auction purchaser with a summary remedy to enforce his rights which existed prior to its enactment, a kind of remedy which but for the section was not available to him" In this view the dropping of the second part of section 315 in the Code of 1908 will only mean that the auction purchaser cannot in summary proceedings obtain a refund of the purchase money outside the cases provided for in rule 92 and not that his right to bring a suit for the purpose would be barred In *Macha Goundan* v *Kottara Goundan*[4], a Full Bench of the Madras High Court after pointing out that the Civil Procedure Code is a code of adjective law and cannot create rights of action and that it would be unconscionable if the auction purchaser is not allowed to sue for refund of the purchase money where in proceedings outside rules 89, 90 and 91 of Order 21 it is found that the judgment-debtor had no saleable interest in the property sold, observed "Whatever might be the theory of law in the minds of the framers of the Code of 1859, it is now clear that the Legislature were unwilling to adopt the view in *Sowdaminee Chowdhrain* v *Kishen Kishore Poddar*[5], and of the law laid down in *Durab Ally Khan* v *The Executor of Khaja Moheeooddeen*[6], and they proceeded to frame the language of the corresponding section in the Codes of 1877 and 1882 on a different theory It is clear that this clause (section 315) recognises the right of an auction purchaser to obtain a refund of his purchase money if there is no saleable interest though there is no warranty of title What is meant is that though in a Court sale there is not such a warranty as to the extent of title as we find in a private transaction between a vendor and a purchaser still the Code adopts the view that there is a limited warranty, *viz*, that the judgment-debtor possesses some little interest however small it may be If the judgment-debtor's interest turns out to be nothing the Court practically makes a promise that the decree-holder will have a refund of his purchase money This is the theory underlying section 315 If once such a right in the purchaser is recognised, on the principle that every right should be capable of being enforced by a suit, a regular suit lies to obtain a refund of the purchase money, but the Legislature proceeded to give a remedy in execution also under section 315 As already observed the right to obtain a refund being recognised by the Code, the remedy by way of suit exists not because the Code gives it but because every right

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1 A I R 1938 All 593 (F B)
2 I L R (1939) 1 Cal 452
3 (1932) I L R 13 Lah 618 (F B)
4 (1936) I L R 59 Mad 202 69 M L J 750 (F B)
5 (1869) 4 Ben L R 11 (F B.)
6 (1877) I L R 3 Cal 806 L R 5 I A 116 (P C)

can be enforced by suit " According to the Full Bench, the present Civil Procedure Code only *limits* the rights of the auction purchaser to obtain refund *in execution* to cases where the sale is set aside by the executing Court under Order 21, rule 92. Where however the sale is set aside not by the executing Court but outside the execution proceedings the general remedy will still remain Which of these two views is to prevail might depend on the Privy Council Any way it may be remembered that the English theory in regard to this matter is *caveat emptor* and that where the purchaser relies on any warranty he should prove either agreement or statutory provision

Even if the correct view be that an auction purchaser can sue for a refund of the purchase money by the decree-holder where the sale is set aside in proceedings outside Order 21, rule 92, the question would still arise whether such refund could be claimed where the judgment-debtor is found to have had some interest in the property though it is not all the interest that was purported to be sold A negative answer has been afforded in the case under review though the reasoning in the Full Bench case of *Macha Goundan* v *Kottara Goundan*[1], that every right should be capable of being enforced by suit would equally apply even where there is a partial failure of consideration from the point of view of the auction purchaser The view taken in the case under review stands fully supported by authority In *Kunhammad* v *Chathu*[2], it had been held that where the judgment-debtor had some saleable interest in the property sold the Court has no jurisdiction to make an order under section 315 This was followed in *Sundara Gopalan* v *Venkatavarada Ayyangar*[3], which was a case of a suit by an auction purchaser for refund of a proportionate part of the purchase money on a declaration made in proceedings initiated by a third party that the judgment-debtor had no title to an item of the property sold. The same conclusion was reached in *Shanto Chandra Mukherje* v. *Nain Sukh*[4], *Sonaram Dass* v *Mohiram Dass*[5], *Nagalinga Chettiai* v *Guruswami Ayyar*[6] The reason is that when the judgment-debtor has a saleable interest, however small, the purchaser at an execution sale purchases at his own risk and there being no warranty that the property will answer to the description given of it the purchaser is entitled to no relief, if the property does not correspond to the description

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PAPARAO *v* POLI NAIDU, (1945) 1 M L J 323

Section 55 of the Transfer of Property Act has two limbs specially directed at protecting the purchaser in regard to the title which the vendor is purporting to convey to him Sub-section 1 (*a*) lays down that the seller is bound to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover The provision contemplates a stage before the transaction of sale is completed and according to the concluding clause of the section an omission to make such disclosure is fraudulent Relief in respect of breach of the seller's duty thus rests on fraud It is therefore intelligible that where the buyer was already aware of the particular defect in title at the time of his purchase he cannot complain of non-disclosure by the seller and recover damages. It is equally intelligible that in such cases evidence to prove the knowledge of the buyer of the existence of an encumbrance not disclosed in the sale deed does not contradict, vary, add to or subtract from the terms of the sale deed and does not offend against section 92 of the Evidence Act The ruling in *Ramasubbu Iyer* v *Muthiah Kone*[7], that where the vendee buys property with full knowledge that the vendor has not got a good title he cannot be said to be defrauded by the vendor is thus consistent with section 55 (1) (*a*) The scope of the covenant of title set out in section 55 (2) of the Transfer of Property Act is altogether different. It provides that the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power

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1 (1936) I L R 59 Mad 202 69 M L J 750 (F B)
2 (1886) I L R 9 Mad 437
3 (1893) I L R 17 Mad 228 3 M L J 293
4 (1901) I L R 23 All 355
5 (1900) I L R 28 Cal 235
6 (1930) 59 M L J 232
7 A I R 1925 Mad 968

to transfer the same. The warranty of title which is thus implied is treated as if it had been a term in the contract It would therefore follow that section 92 of the Evidence Act would bar evidence to affect it, except by proof in the manner provided by the opening words of section 55, Transfer of Property Act, namely, by proving a contract to the contrary. In the absence of any such contract the statutory covenant is as pointed out by Sulaiman, J, in *Muhammad Siddiq* v *Muhammad Nuh*[1], absolute and irrebuttable Even if the buyer was aware of any defect in the title at the time of his purchase he may under this covenant hold the seller responsible in damages, see *Ram Chunder Dutt* v *Dwarakanath*[2], *Basaraddi Sheikh* v *Enjaddi*[3], *Mahamed Ali* v *Venkatapathi*[4], *Mt Lakhpat Kuer* v *Durga Prasad*[5]. The implied covenant constitutes an absolute warranty and supersedes the rule of *caveat emptor*, see *Raghava* v. *Samachariar*[6], *Kanshi am v Jaimal Singh*[7]. The buyer's antecedent knowledge of the defect in title does not deprive him of his right to sue for damages, see *Subbaraya* v *Rajagopala*[8], *Adikesavan* v *Gurunatha*[9], *Parasurama* v *Muthuswami*[10], *Nawal Kishore* v. *Sarju*[11]. If relief had been claimed and was dependent on proof of fraud then knowledge of the buyer would be relevant but where the relief is awardable on the footing of a convenant which the parties are deemed to have entered into there is no escape except by proof of a contract to the contrary Any suggestion to the centrary afforded by *Ramasubbu Iyers' case*[12] is not correct and the case under notice has justifiably dissented from such suggestion

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PERIAKARUPPAN CHETTIAR *v.* RAMASWAMI CHETTIAR, (1945) 1 M L J. 391 : I L R. (1945) Mad 742

As early as the days of Sir Edward Coke it had been well recognised that a "payment ought to be real and not in shew or appearance"[13] But it had also been held that a payment may be made by the mere transfer of figures in an account without any money passing, *Eyles* v *Ellis*[14], *Bedenham* v *Purchas*[15], *Hills* v. *Mesnard*[16] On these principles, the question frequently arose whether the periodical addition of interest to the capital and its being made to carry interest at the stipulated rate for the next period would amount to a payment of interest without leaving it outstanding In *Reddie* v *Williamson*[17], Lord Cowan had observed "The true view is that the periodical interest at the end of each year is a debt to be then paid and which must be held to have been paid when placed to the debit of the account as an additional advance by the bank" In *Inland Revenue Commissioners* v *Holder*[18], the claimants had guaranteed the payment of monies owing to a bank by a customer and had been called upon to pay the balance accumulated over a period of years, on the customer committing default The claimants paid the amount and sought refund of income-tax on so much of the sum paid as was said to constitute the interest on the advances made by the bank to the principal debtor The claim would be tenable only if the guarantors could be held to have paid to the bank any outstanding interest on the advances made by it to its customer. The question thus directly arose, whether the interest which as between the bank and its customer was capitalised in the case at the end of each half year and carried forward into the next half year as principal advanced, could still be regarded as accumulated interest paid by the guarantors In holding that it could not be so regarded, Romer L J, observed. "I am of opinion that having regard to the method in which, with the concurrence of the company the account was kept by the bank, the company must be deemed to have paid each half year the accruing interest by means of an advance made for that purpose by the bank to the company".

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1 (1930) I L R 52 All 604
2 (1889) I L R 16 Cal 330
3 (1898) I L R 25 Cal 298
4 (1920) 39 M L J 449
5 (1929) I L.R 8 Pat 432
6 (1914) 22 Ind Cases 42
7. (1923) 75 Ind. Cases 562.
8. (1915) I L R 38 Mad 887
9. (1917) I L R 40 Mad 338
10 (1925) 50 M L J 100
11 (1932) I L R 54 All 774
12 A I R 1925 Mad 968
13 Co Litt 209 b
14 4 Bing 112
15 2 B & Ald 39
16 10 Q B 266
17 1 Macph 228
18 (1931) 2 K B 81

This view was however rejected in *Paton* v. *Inland Revenue Commissioners*[1], where the fiction that in such cases the interest can by the mere process of being capitalised be said to have been paid was held to be without warrant Lord Atkin remarked : " The question is whether when the charges are added to the existing indebtedness at the end of one half year and the whole sum brought down as a debit item at the beginning of the next half year so that interest is charged on the last half year's interest, the charges have been paid. The ordinary man would, I think, say that so far from being paid they are added to the ordinary indebtedness because they are not paid, and I can see no reason why the law should say anything different". The observations in *Holder's case*[2] were not approved The English law would thus according to *Paton's case*[1] be in accordance with Sir Edward Coke's statement that payment must be *real* and not by way of show or appearance In India, it had been laid down that the mere carrying forward of the amount of a loan or deposit, with the interest due thereon, in the debtor's books though such entry is made in the presence of the creditor does not amount to a payment of interest, *Iccha* v *Natha*[3], *Kollipara v Maddula*[4] In *Kariyappa* v *Rachappa*[5] it was however held that where the interest was calculated up to the date of adjustment and the defendants debited the balance so found due in their books to the profit and loss account and credited it to the plaintiff's account as additional advances and corresponding credits and debits were made in the plaintiff's books, the adjustment being of a double character, it would amount to a payment of interest . This view may be regarded as proceeding on the theory of an agreement between the parties to so regard the interest, the adjustment being bilateral and not unilateral *In Palaniappa Mudaliar* v *Narayana Aiyar*[6], the principle laid down in *Holder's case*[2], was followed by the learned Judges In view however of the non-acceptance of that principle by the House of Lords in *Paton's case*,[1] in the case under review *Palaniappa Mudaliar's case*[6] was considered to be no longer good law and it was laid down that the fact that interest was added periodically to the principal sum outstanding and made to carry interest at the stipulated rate cannot be deemed tantamount to payment of such interest

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RAMUDAMMA *v.* KASI NAIDU, (1945) 1 M L J. 396.

The rule of law is well established that it is entirely within the discretion of the civil Court to grant a decree for the restitution of conjugal rights It is equally well established that whatever cannot be the subject of an agreement between the parties cannot be the subject of arbitration Thus the question whether a marriage is null or whether a marriage should be dissolved cannot be referred to arbitration, see *Soilleux* v *Herbst*[7], *Bateman* v. *Ross*[8], *Hooper* v *Hooper*[9], *Wilson* v *Wilson*[10], *Besant* v *Wood*[11], *Hart* v *Hart*[12], *Calhill* v. *Calhill*[13] For, any agreement between the parties in regard to such matters would be opposed to public policy. In this context the question has occasionally arisen whether it will be open to a Court to refer to arbitrators any matter in dispute in a suit for restitution of conjugal rights Section 21 of the Arbitration Act, 1940, lays down . " Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference " As will be seen the language of the section is very wide and empowers the Court to refer " *any matter in difference*" between the parties to the suit to arbitration provided the parties are agreed The section reproduces in substance the provisions of para 1, schedule 2 to the Civil Procedure Code In *Malka* v *Sardar*[14], following an earlier decision of the Court in *Hira* v *Dina*[15], it was held that the question of restitution of conjugal rights cannot be referred to arbitration and the matter must be decided by the Court itself The

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1 L R 1938 A C 341
2 (1931) 2 K B 81
3 (1888) I L R 13 Bom 338
4 (1896) I L R 19 Mad 340
5. (1900) I L R 24 Bom 493.
6 (1942) 2 M L J 753
7 (1801) 2 Bos & P 444
8. (1813) 1 Dow 235
9 (1860) 1 Sw & Tr. 602
10 (1848) 1 H L Cas. 538.
11 (1879) 12 Ch D 605
12 (1881) 18 Ch D 670
13 (1883) 8 A C 420
14 A I R 1929 Lah 394
15 37 P.R. 1895

same view had been taken in *Kalabatu* v *Prabhu Dial*[1], and *Nathu* v *Sarnum*[2]. In *Hira* v *Dina*[3]; the parties were minors and as the Court took the view that their interests were not properly safeguarded by the trial Court when it referred the suit to the decision of the arbitrators, the Court could naturally set aside the entire proceedings In *Rup Narain* v *Mt Nandrani*[4], the Chief Court of Oudh took the view that it would be competent to the Court to refer on agreement between the parties to the decision of arbitrators the question of restitution of conjugal rights. It was pointed out that it has nowhere been held that a suit for restitution of conjugal rights is not such a suit as comes within the purview of para 1 of schedule 2 of the Civil Procedure Code and cannot be referred to arbitration even where all the parties interested therein agree to have the dispute settled by arbitration, and that there is no provision of law excluding such suits from the scope of schedule 2 of the Code It was further pointed out that the function of the Court to grant or refuse to grant a decree for restitution cannot on reference to arbitration be said to be delegated to the arbitrators, inasmuch as the Court has ample powers to remit the award to the arbitrators for reconsideration or to refuse to make the award a decree of Court It would follow that in the absence of an express provision to that effect there is no reason for holding that para 1 of schedule 2 of the Code, and its present counterpart section 21 of the Arbitration Act does not empower the Court to refer to arbitration a matrimonial dispute forming the subject of a suit before it, where the parties desire such a reference The case under review has adopted this view and is thus in consonance with the view of the Oudh Chief Court though opposed to that found in the Lahore decisions

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JAGANNATH SOWCAR *v* SRIPATHI BABU, (1945) 1 M L J. 478

An interesting question bearing on the liability of a mortgagee in possession fell to be decided in this case A puisne mortgagee had gone into possession of the properties with the consent of the mortgagor undertaking to clear off prior encumbrances The arrangement was that "he should collect the rents and profits, pay all taxes and maintenance charges out of his collections and appropriate the surplus to the amount due under his mortgage" The mortgagee failed to clear off all the encumbrances and would not account A suit for redemption was thereupon filed by the mortgagor The mortgagee had paid off only one of the prior encumbrances and it was found that the monies collected by the mortgagee under the arrangement made when he went into possession were more than sufficient to meet all expenses and to pay him the amount due under his own mortgage In regard to accounting, the question arose whether any interest was allowable on the collections wrongfully withheld by the mortgagee The Interest Act has been held to leave it open to the Court to award interest where it would be equitable to recognise a claim therefor, see *Attikoya* v *Kunhikoya*[5] According to Halsbury's Laws of England (vol 23, p 176, 2nd edition) cases of mortgagor and mortgagee, and debtor and creditor where the former is in a fiduciary position to the latter are of that description It has been generally held in India that the mortgagee is liable to pay interest on the surplus amount in his hands though there are conflicting dicta regarding the point of time from which it is payable, whether from the time the debt arises or from the time of the filing of the suit for redemption, see *Haji Abdul Rahman* v *Haji Noor Mahomed*[6], *Bhaya Lal* v *Mohammed Hakim*[7], *Janoji* v. *Janoji*[8] In *Ismail Hasan* v *Mahdi Khan*[9], it is no doubt held that no interest is payable on the surplus amount which had been wrongfully retained by the mortgagee till the date of the institution of the suit This decision does not however allow for the fiduciary position analogous to that of a trustee which the mortgagee who has gone into possession with the consent of the mortgagor occupies. It is hardly open to doubt that the principles underlying sections 90 and 95 of the Trusts Act would be applicable to his case and the case under notice constitutes a clear recognition of such applicability

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1 (1918) 45 I C 163
2 A I R 1933 Lah 532
3 37 P R 1895
4 A I R 1934 Oudh 494 152 I C 90
5. (1939) 2 M L J 579 I L R (1940) Mad. 50
6 (1894) I L R 16 Bom 141
7 (1920) 57 I C 294
8 (1883) I L R 7 Bom 185
9 (1924) I.L R 49 All. 897.

MANICKA NADAR *v.* ARUMUGHA SUNDARA SATHIA GNANA PANDARASANNADHI, (1945) 2 M L J 7.

This case decides that, in respect of a usufructuary mortgage, the period fixed for redemption must govern the rights and relations of parties in the absence of a contract to the contrary, and that if one party fails to fulfil the obligations imposed upon him the other party will have to pursue his remedies in damages only but cannot avoid the transaction itself On this matter there has been a certain amount of conflict of judicial opinion In *Subba Rau* v *Devu Shetty*[1], *A* had mortgaged his land to *B* for Rs 800 , under the terms of the mortgage *B* was to pay Rs 500 in discharge of a previous mortgage executed by *A* in favour of *C* and the rest of the consideration was to be adjusted for other purposes. *B* did not discharge the previous mortgage and *C* recovered the money from *A* It was held that, in the circumstances, *A* could cancel the contract of mortgage with *B*, owing to *B's* conduct, but subject to the repayment of the consideration he had from *B* with interest thereon and that it would not be open to *B* to treat the mortgage as one in force with all its stipulations operating to the extent of the consideration paid Muttuswami Ayyar, J , observed " Under section 39 of the Contract Act, the mortgagor was entitled to cancel the contract of mortgage on the ground that the mortgagee in contravention of his agreement incapacitated himself from performing it in its entirety " In *Narasimha Rao* v *Seshayya*[2] a similar view is to be found In that case, the transaction was by way of a usufructuary mortgage for 55 years and the mortgagee was to make certain payments to the mortgagor every year for beriz, *etc* The mortgagee who had gone into possession committed default and the mortgagor sued for redemption Devadoss, J , cited the observations of the Privy Council in *Bhaktawar Begum* v *Hussaini Khaunum*[3]—" Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right to redeem can only arise on the expiration of the specified period But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property."—but went on to hold that " in a case like this, I think, a Court of equity ought to give relief to the mortgagor and allow him to redeem the property before the expiry of the term." The Allahabad High Court also took the same view in one of its decisions, *Chhotku Rai* v. *Baldeo Shukul*[4] In that case there was a mortgage by way of conditional sale for Rs 599-15-0 and the term was 10 years Only Rs. 50-15-0 was actually paid, the balance being left with the mortgagee for payment to prior incumbrancers This was not done The mortgagor sold the property and his assignee sued for redemption before the expiry of the ten year period It was held that on equitable grounds redemption should be allowed. The learned Judges said : " It seems to us that if under the circumstances of the present case the defendants . . are allowed to remain in possession of the property over the full period of ten years taking the profits and allowing the interest on the prior incumbrances to accumulate, the plaintiffs will be without any proper or effectual remedy It is doubtful whether a suit for damages could possibly be brought at the present time and at the expiration of the period of ten years it will only be an effectual remedy if the defendants . are sufficiently good marks for damages. We think that on equitable grounds the defendants not having performed what we deem to be a most essential part of the contract so far as they are concerned, the plaintiffs ought to be allowed to redeem the property before the expiration of ten years ". *En passant* it may be mentioned that this ruling had failed to notice an earlier decision of the same Court to a contrary effect in *Rashik Lal* v *Ram Narain*[5] Redemption moreover was permitted on equitable considerations and on the principle of section 39 of the Contract Act. Both these grounds are thin and open to criticism In these cases the stage of contract is already passed and the transaction has resulted in a conveyance. Section 39 of

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1 (1894) I L R 18 Mad 126
2 (1925) 48 M L J 363
3. (1914) 26 M L J 474 : I L R 36 All 195 (P C)
4 (1912) I L R 34 All. 659
5 (1912) I L R 34 All 273

the Contract Act cannot therefore apply. In *Velayutha Chetty* v. *Govindaswami Naicken*[1] it was pointed out that after conveyance the vendee is entitled to possession according to the Transfer of Property Act and the unpaid vendor has only a charge on the property, which however does not mean that if the vendee sues for possession it can be withheld until he pays the purchase money and that the vendor is entitled to retain possession. It was also held that there is no scope for the application of any equitable doctrine in face of the clear provisions of the Act. The same conclusion was reached in *Krishnamma* v. *Mali*[2] where it was laid down that the unpaid vendor's lien is only a charge and not a possessory lien and that the Courts cannot give relief to mitigate or suspend the consequences laid down by the statute, the Transfer of Property Act. That it will make no difference if the conveyance is not a sale but only a mortgage is recognised in *Rashik Lal* v. *Ram Narain*[3] where it was held that if there was execution and registration of a mortgage, the fact that a part of the mortgage money as specified in the deed of mortgage has not been paid neither renders the mortgage invalid nor entitles the mortgagor to rescind it at his option. It is true that under the Act in a sale, in the absence of a contract to the contrary, the ownership of property passes from the vendor to the vendee as soon as the sale deed is registered and that neither delivery of possession nor payment of price is a condition precedent. But the definition of a mortgage in section 58 shows that a mortgage is not a mere contract but is a conveyance of an interest in land. It follows that no sooner a valid mortgage deed is registered, an interest in the mortgaged property vests in the mortgagee in the absence of a contract to the contrary, notwithstanding that the mortgage money has not been paid. Non-payment of the mortgage money does not render the mortgage invalid. Section 39 of the Contract Act can have no application for the simple reason that it deals with contracts only and not with transfers. In the absence therefore of a contract that no interest in the mortgaged property shall pass without the payment of the mortgage money it is difficult to accept the view propounded by Muttuswami Ayyar, J., in *Subba Rau* v *Devu Shetty*[4]. Section 4 of the Transfer of Property Act does not put an end to the vital distinction between a contract and a transfer of an interest in land, for it only enacts that the chapters and sections of the Act which relate to contracts shall be taken as part of the Indian Contract Act. More or less the same line of reasoning is adopted by the learned Judges in *Kandaswami Pillai* v. *Ramaswami Mannadi*[5]. That was a case of lease and under the terms of the lease deed there was a demise of land and the lessee had undertaken to pay a debt of the lessor secured on the lands. The lessee did not do so and the lessor had to execute a usufructuary mortgage to satisfy the debt. Thereupon the lessee brought a suit to recover possession of the land demised. It was pointed out that a lease is not a mere contract but is the transfer of an interest in immoveable property and the right of the lessee to be put in possession arises from the words of the demise which imply that the right to possession is granted to the lessee and the lessor is not entitled to refuse to give possession unless the lease document provides that the lessee is not to have possession till the fulfilment of certain conditions precedent. The argument founded on the applicability of section 39 of the Contract Act was rejected on the ground that that section applies only to a state of things where there is a series of executory promsies on both sides and that so soon as one part of the obligation has been performed by a complete transfer of the property in question that section ceases to have any application. Adverting to the view found in *Chhotku Rai* v. *Baldeo Shukul*[6], Coutts Trotter, J., remarked : " all I can say is that I do not understand it as reported nor do I gather upon what principles the learned Judges proceeded." The conclusion in the case under review is in accord with the later pronouncements of the Madras High Court and the earlier ruling of the Allahabad High Court in *Rashik Lal* v *Ram Narain*[3].

1. (1910) I L.R 34 Mad 543
2. (1920) I L.R. 43 Mad 712.
3. (1912) I L R. 34 All. 273
4. (1894) I.L.R. 18 Mad. 126.
5. (1918) 36 M.L J. 313: I.L.R. 42 Mad. 203.
6. (1912) I.L.R. 34 All. 659.

NALLA GOUNDAR *v.* KRISHNASWAMI NAICKER, (1945) 2 M.L.J 133

The construction of clause (*b*) of section 74 of the Registration Act came up in this case which decided that the phrase "requirements of the law for the time being in force" in that clause has reference only to the requirements of the Registration Act or of any statutory provision which the Legislature has said shall be regarded as being supplemental to the Registration Act. It cannot be disputed that the words "law for the time being in force" are wide enough to take in any law which has reference to registration unless there is anything in the context to suggest a restricted meaning. No doubt section 4 of the Transfer of Property Act provides that "sections 54 paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908" Such a provision can no more operate as a pointer that it is only laws declared to be supplemental to the Registration Act that are to be considered by the Registrar under section 74 (*b*) than the provision in section 4 of the Specific Relief Act, for example, that "except where it is herein otherwise expressly enacted nothing in this Act shall be deemed to affect the operation of the Indian Registration Act on documents" could be taken as laying down that where a rule of construction of that type is not expressly enacted in any enactment, its provisions shall be ignored by the Registrar even if they had advertence to registration of documents The reasoning of the learned Judges in the case under notice that the Registrar need not take into consideration the requirements specified in section 145 (2) of the Estates Land Act, since the Legislature, if it had intended to provide differently would have inserted a clause making that provision a supplemental provision of the Registration Act as it did in the case of the Transfer of Property Act, is not, with respect, either conclusive or compelling. The next argument of the learned Judges is that inasmuch as it may happen that the transferor may not join in the application for registration and the transferee may therefore have to move the Collector and obtain his orders, a period of more than four months might well elapse from the date of the transfer with the result that the Registrar will be precluded from thereafter receiving the document for registration. Two observations fall to be made. One is that the proceedings before the Collector being summary need not take much time Secondly, the possibility of hardship ensuing cannot justify an abridgment of the meaning of words, where no ambiguity exists. In the Registration Act itself, there are provisions employing similar language, where the *prima facie* construction would alone be the proper construction. Thus section 90 (1) (*c*) states that nothing in the Act shall be deemed to require the registration of any "documents which under any law for the time being in force are filed periodically in any revenue office" etc. It is clear that the expression "any law for the time being in force" will cover all laws whatever, whether made a supplemental provision of the Registration Act or not, if they had to do with the filing of documents in any revenue office periodically. Similarly the reference in section 39 to "the law in force for the time being as to summons" etc., will take in laws like the Civil Procedure Code though there may be no provision that the Civil Procedure Code is to be regarded as supplemental to the Registration Act.

The words "law for the time being in force" and similar expressions occur at different places in the Indian Contract Act and in other enactments and have come up for judicial construction. Section 21 of the Contract Act refers to mistakes as to "any law in force in British India." The words "any law" occur in section 23. Section 25 alludes to the "law for the time in force for the registration of documents." Section 28 uses the expression "any law in force for the time being as to references to arbitration" Likewise section 4 of the Trusts Act uses the words "any law." It can hardly be disputed that in all these cases the words will take colour from the context and will have to be understood in their plain and literal sense unless a different intention is expressed or is implicit. Turning to the decisions, the words "any law" in section 23 of the Contract Act have been held in *Ramamurthy* v. *Gopayya*[1] to cover the provisions of the Indian Limitation Act. But in *Hukum*

1. (1916) 31 M.L.J. 231 : I.L.R. 40 Mad. 701.

Chand Oswal v *Taharunnessa Bibi*[1], where the question was whether an agreement to give time for satisfaction of a judgment debt, entered into without the sanction of the Court, was opposed to section 257-A of the Civil Procedure Code and therefore void under section 23 of the Contract Act, it was held by Princep and Ghose, JJ, that " the words ' any law ' as mentioned in section 23 of the Contract Act, . . . refer to some *substantive* law, and not to an adjective law, such as the Procedure Code is." In *W W. Broucke* v. *Rajah Saheb Mohan Bikram Shah*[2], Chitty, J, remarked that the expression " requirements of the law for the time being " in section 74 of the Registration Act refer to requirements "in the manner generally prescribed by the Act." To take that observation as suggesting that it is only those provisions in enactments that are declared as supplemental to the Registration Act that should be regarded under section 74 will be a debatable inference. On a balance of consideration it looks as if the more satisfactory construction of the words " whether the requirements of the law for the time being in force have been complied with " in section 74 clause (*b*) would be " whether the requirements of *any law* which had reference to registration " have been complied with. It would, in that view, follow that the provisions of section 145 of the Estates Land Act also will have to be regarded by the Registrar under section 74 of the Registration Act.

SURYANARAYANA *v*, THE PROVINCE OF MADRAS, (1945) 2 M.L J. 237 (F.B)

Section 6 (1) of the Land Acquisition Act enacts that on being satisfied that any particular land is required for a public purpose the Provincial Government shall make a declaration to that effect provided the compensation to be awarded for the compulsory acquisition of such property is to be paid *wholly or partly* out of public revenues or some fund controlled or managed by a local authority. The expression " wholly or partly " has on more than one occasion come in for judicial construction. Not infrequently it has happened that out of the amount payable as compensation to the owner of the property, a trifling sum, such as one anna, is alone paid by the Government In such cases the question has arisen whether the acquisition is *bona fide* at all. The word ' part ' according to the Dictionary means "something less than the whole", "a portion," "a fraction," "a member or essential part of a whole." It would seem that an infinitesimal or small portion may not with propriety be regarded as " part." The word " particle " is used as appropriate to signify " a little part " or " a very small portion " If the word " partly " in section 6 is to be understood in the sense of the Dictionary exposition, the question mooted *supra* will be susceptible of a negative answer. In *Chatterton* v *Cave*[3], a case of copyright, involving the interpretation of the words " or part thereof," in the Dramatic Copyright Act, 3 and 4, Williams IV, c 15, section 2, Lord O'Hagan observed . " The question in every case must be one of fact . ' part ' is not necessarily the same as ' particle ' and there may be a taking so minute in its extent and so trifling in its nature as not to incur the statutable liability " And accordingly the House of Lords were disinclined to countenance a meaning that would make a part a particle and they observed that the words should be reasonably construed as meaning some part that was substantial and material.[4] More or less the same view was expressed by Collins, M R., in *London and India Docks Co.* v. *G E Railway & Midland Railway*[5], where he held that the words " part of a continuous line " of railway communication in section 25 of the Railway and Canal Traffic Act, 1888, does not mean " a mere infinitesimal part, but a part which would be *substantially* treated as a part of the transitus between two given places " The English decisions are thus in line with the Dictionary exposition of the term ' part.' In *Ponnaia* v *Secretary of State for India*[6] it was argued that the provision in section 6 of the Land Acquisition Act that the compensation should be paid wholly or partly out of public revenues was intended to be a test of the good faith of Government and that a payment of one anna out of a sum of Rs. 3,352-5-0, the compensation

1. (1889) I L R 16 Cal 504
2. (1909) 14 C W N 12.
3. (1878) 3 A.C. 483.
4. See also *Walter* v *Steinkopff*, (1892) 3 Ch. 489
5. (1902) 1 K.B. 568 at 589.
6. (1926) 51 M.L.J. 338.

awarded, *i.e.*, 1/90000th part, by Government, was not a real and *bona fide* compliance with the terms of the section. The contention was upheld on the authority afforded by the English decisions. This view was however dissented from in *Senga Naicken* v *Secretary of State for India*[1], where also Government had paid only one anna out of Rs. 600 the amount awarded as compensation, from the public revenues. Odgers, J., remarked : " It is difficult to state where a 'particle' would end and 'part' would begin of this sum of Rs. 600. It is true an anna is a very small part of Rs. 600. But nevertheless it is a part." Madhavan Nair, J., the other learned Judge observed: " It is true that one anna is a small part of Rs. 600 , still it cannot be denied that it is part of that amount If one anna is not to be considered as a part of the amount for the purposes of this proviso, then how are we to find what portion of it will form a part of it to satisfy the meaning of the words in question in the proviso ? If the Legislature intended that a substantial portion of the compensation should be paid out of the public revenue then it would have used appropriate language to convey that idea " With great respect, the latter remark is almost like begging the question. According to the Dictionary, " if a very small part " as Odgers, J , and " a small part " as Madhavan Nair, J , described was alone paid, the appropriate word to be used is " particle," and it is only where something more than a " particle " was paid that it could be said to be paid in " part " out of the public revenues. Such user is also in consonance with the English precedents In the case under review the Full Bench preferred to affirm the view taken in *Senga Naicken's case*[1]. In the Full Bench case the Government had only contributed one anna to the compensation of Rs. 77-10-0 awarded. Notwithstanding this preference, there is much that can be said for the view that has been rejected.

ALI MAHOMED ADAMALLI *v.* EMPEROR, (1945) 2 M.L J. 356

This decision is yet another pronouncement by the Judicial Committee on the law of contempt. It is well settled that jurisdiction in contempt is special and extraordinary. The Court acts in *brevi manu* The exercise of the jurisdiction may be open to the charge of arbitrariness. In In re *Erlanger, Costa Rica* v. *Erlanger*[2], Sir George Jessell, M R , indicated that, since the remedy of committal for contempt of Court is arbitrary and unlimited, it should be most jealously and carefully watched and should only be exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness which can be brought to bear upon the subject. The reassurance by the Judicial Committee in the case under notice that "Their Lordships have no desire to lessen the standard of care and circumspection to be observed by all Courts before exercising their jurisdiction to commit for contempt " is entirely welcome. The qualification however which the Board has made will in a great measure leave a large margin of discretion to the Judges *Apropos* of the argument that the Court cannot commit for contempt if there is any other remedy, the Judicial Committee characterised it as novel and unsupported by authority. It is true that such an argument was urged in *R* v. *Almon*[3] but did not prevail. Their Lordships point out that the fact that there is another remedy available is no doubt a matter for the Court to consider when exercising its discretion whether to commit or not to commit, but will not affect the existence of such power or its exercise in a proper case, as where speed is desirable and there is necessity of ensuring that the orders of the Court are obeyed. Without in any way challenging the correctness of the statement as to the existence of the power, the matter may perhaps be put in a slightly different form, *viz.*, that the Court will not except in extraordinary cases permit the jurisdiction in contempt to be invoked where there exists another remedy. . Lawyers are for instance familiar with the principle that the Court will not issue writs in the nature of *certiorari* etc., in cases where another remedy may be open to the party to secure redress of his grievance. A similar self-imposed restraint

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1 (1926) 51 M.L J. 849 · I.L.R. 50 Mad. 308.
2. (1877) 46 L.J. Ch. 375 at 381, 382.
3. (1765) Wilm. 243 : 97 E.R. 94.

may operate in the field of contempt law as well. In the words of Lord Goddard in *Parshram Detaram Shamdasani* v. *King-Emperor*[1], "It is a power which a Court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised."

APPA RAO *v* GOPAL DOSS, (1945) 2 M.L.J. 363.

A short and interesting point fell to be decided in this case, namely, what difference exists between an authority to sell and an authority to find a purchaser conferred on an agent No doubt it would be primarily a question of construction of the actual terms of each power. There are however certain legal principles which come in handy in regard to the assessment of the question. It is settled law that an authority conferred in general terms is construed to permit acting only in the usual way and according to the ordinary course of business. It is equally settled that powers of attorney should be strictly pursued and are construed as giving only such authority as they confer expressly or by implication, see *Bryant* v. *La Banque du Peuple*[2]. An agent employed to find a purchaser has been held to have implied authority to describe the property and state to an intending purchaser any facts or circumstances which may affect its value, *Mullens* v. *Miller*[3]. Even an estate agent who is instructed to find a purchaser for a certain property will have no authority to enter into a contract for the sale of the property, because it is not usual for such agents to enter into contracts on behalf of their principals unless expressly authorised to do so, their duty being merely to submit to their principals any offers, which may be made to them, *Chadburn* v. *Moore*[4], *Hamer* v. *Sharp*[5], *Thuman* v. *Best*[6], *Prior* v. *Moore*[7], *Wilde* v. *Watson*[8], *Carney* v. *Fair*[9], *Lew cock* v. *Bromley*[10], *Keen* v. *Mear*[11]. As pointed out by Mookerji, J., in *Durga Charan Mitra* v. *Rajendra Narain Sinha*[12], there is a substantial difference between an authority to sell and an authority to find a purchaser: "authorising a man to sell" according to Buckley, J, means "an authority to conclude a sale. authorising him to find a purchaser means less than that— it means to find a man willing to become a purchaser, not to find him and also make him a purchaser," *Rosenbaum* v. *Belson*[13]. In the case under notice their Lordships found that the authority given to the agent was not to negotiate and refer back but to negotiate and complete the contract and in that view it was held that it would be competent to the agent to conclude the sale

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ABERNEATHY GREENWOOD *v*. HILDRED GREENWOOD, (1945) 2 M.L J. 389.

In the words of the learned Chief Justice "this case is unparallelled and it raises an important question of law." Section 7 of the Divorce Act provides: "Subject to the provisions contained in this Act, the High Courts and District Courts shall in all suits and proceedings hereunder, act and give relief on principles and rules, which in the opinion of the said Courts are as nearly as may be, conformable to the principles and rules, on which the Court of Divorce and Matrimonial Causes in England for the time being acts and gives relief." Under section 19 of the Act, a petition praying that the petitioner's marriage may be declared null and void may be decreed on the ground that the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force. In the case under notice, the petition was by the wife and a declaration of nullity was sought on the ground that at the time of her marriage to the respondent on the 9th June, 1933, his first wife whom he had married on 10th September, 1913, was still alive and the marriage with her was subsisting. The burden of proof obviously lay upon the petitioner of establishing

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1. (1945) 2 M.L J 109 (P.C).
2. (1893) A.C. 170.
3. (1882) 22 Ch.D. 194
4. (1892) 61 L.J. Ch. 674.
5. (1874) L.R 19 Eq. 108.
6. (1907) 97 L T. 239.
7. (1887) 3 T.L.R. 624.
8. (1878) 1 L.R. (Ir) 402.
9. (1920) 54 I.L.T. 61.
10. (1920) 37 T.L.R. 48.
11. (1920) 2 Ch. 574.
12. A.I.R. 1923 Cal. 57.
13. (1900) 2 Ch. 267.

these facts, *William Hudson* v. *Mrs. Webster*[1]. She failed to prove the facts. She however claimed that she could press into service the presumption arising under section 107 of the Evidence Act. According to that section, when the question is whether a person is alive or dead, and it is shown that the person was alive within 30 years, the burden of proving that the person was dead is on him who affirms it. In the case under notice, the first wife having been alive admittedly within 30 years, the burden of proving that at the time of his marriage with the petitioner she was either dead or that the marriage with her was not subsisting would therefore lie on the respondent. Since the Evidence Act is a code which not only defines and amends but also consolidates the law of evidence and applies to all judicial proceedings in or before any Court the rule in section 107 shifting the burden of proof will *prima facie* operate. Section 107 is however to be read subject to section 108 which lays down: "Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is shifted to the person who affirms it" In the case under review, it was found that the respondent had not heard anything of his first wife after 1923. There was a son of that marriage and at least for the sake of the boy the husband might be expected to hear from her had she been alive It was also clear that she had no other relatives In the circumstances it would be doing no violence to treat the husband as a person "who would naturally have heard of her," though she had left him of her own accord In the case under notice, the decision is not however based on this ground. It was held by the Court that the provisions of section 107 of the Indian Evidence Act must be ignored as it is in conflict with the provisions of the Divorce Act. It may, with respect, be pointed out that the position is debatable Granting of relief would no doubt depend on the substantive law. Declaration of nullity cannot be had unless the first wife was shown to be alive at the time of the second marriage But how is that fact to be established? It may be done either by direct testimony or by way of inference from admitted or proved facts Both courses are permissible And it concerns the domain of adjective law. Such adjective law is provided in respect of "*all judicial proceedings in or before any Court*" by the Evidence Act (*see* section 1) No reservation is made in regard to divorce cases It is also well to remember that the Evidence Act is a later enactment. The fact that in English law there is no presumption corresponding to that in section 107 can hardly be material Even section 7 of the Divorce Act provides for relief being given "as nearly as may be" conformably to the principles and rules in England. The common law rule in England as to inadmissibility of the testimony of spouses as to non-access and consequent illegitimacy of the child has been considered in a number of decisions in Madras to be inapplicable in this country in view of the provisions of the Evidence Act, *John Howe* v *Charlotte Howe*[2], *Purna Hanumantha Rao* v. *Ramachandrayya*[3], *etc* And there is no reason why in the case of the provisions of section 107 of the Evidence Act a different course should be adopted and the section ignored because there is no rule in England corresponding to that section.

In re BHUPATHIRAJU RAMARAJU, (1945) 2 M.L.J. 407.

Section 114 of the Evidence Act lays down: The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct etc, in their relation to facts. Illustration (*a*) states that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless

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1. A.I.R. 1937 Mad. 565.
2. (1913) 25 M.L.J. 594: I.L.R. 38 Mad. 466 (F.B.).
3. (1944) 1 M.L.J. 285, see also *Mayandi Asari* v. *Samu Asari*, (1931) 61 M.L.J. 874: I.L.R. 55 Mad. 292.

he can *account* for his possession. The question that fell to be considered in the above case was whether such a presumption could be drawn against a born deaf and dumb mute who was found in possession of stolen goods shortly after the theft. It is clear that the presumption under the illustration can arise only if the person cannot account for his possession Accounting can be contemplated only where the person called upon to account is in possession of reasoning faculty If he cannot descriminate between right and wrong he cannot appreciate the significance of what he is required to account for In Coke on Littleton, 426, it is stated that a person born deaf and dumb, or born deaf and blind was to be presumed to be an idiot. Likewise in the *Jus civile* it is laid down "' Lunatics too ; the deaf and the dumb, etc , must have curators given to them, for they cannot direct their own affairs " That ability to understand the questions put is a *sine qua non* to any inference being drawn from the conduct of the person interrogated adversely to him, is also consistent with section 118 of the Evidence Act, that a person will not be competent to testify if he is prevented from understanding the questions put to him or from giving rational answers by reason *inter alia* disease, whether of body or mind, or any other cause of the same kind It has been held that when a witness is so deaf and dumb that it is impossible to make him understand the question put to him he cannot be a competent witness, *Venkattan* v *Emperor.*[1] Where a person is born deaf and dumb it is not possible to communicate with him effectively and if he cannot understand what he is asked and therefore cannot afford any explanation it would altogether be contrary to the principles of natural justice to draw any inference against him The conclusion in the case under review that in the circumstances the conviction of such a person on a presumption of guilt cannot be supported is thus in full accord both with the principles of law as well as of natural justice

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1 (1912) M W.N 100 · 14 I.C. 655.